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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

A. L. LOCKHART, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION ..... *Petitioner*

VS.

DARREL WAYNE HILL ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WINSTON BRYANT
ARKANSAS ATTORNEY GENERAL

BY: *OLAN W. REEVES, ESQ.
SENIOR ASSISTANT ATTORNEY GENERAL
ARKANSAS BAR NO. 85136
200 TOWER BUILDING
323 CENTER STREET
LITTLE ROCK, ARKANSAS 72201
(501) 682-8078
Attorneys for Petitioner
*COUNSEL OF RECORD

ARKANSAS LEGISLATIVE DIGEST, INC.

QUESTION PRESENTED FOR REVIEW

DID THE EIGHTH CIRCUIT COURT OF APPEALS ERR IN CONCLUDING THAT, BECAUSE IT WAS AFFIRMING THE GRANT OF HABEAS RELIEF TO HILL ON ONE SENTENCING ISSUE, IT DID NOT HAVE TO ADDRESS A REMAINING SENTENCING ISSUE ON WHICH THE DISTRICT COURT ERRONEOUSLY PREMISED HABEAS CORPUS RELIEF, IN SPITE OF THE FACT THAT THE UNRESOLVED ISSUE WILL RECUR ON RE-SENTENCING AND BECOME THE SUBJECT OF HABEAS LITIGATION ANEW, THUS ENCOURAGING DUPLICITOUS AND PIECEMEAL HABEAS LITIGATION?

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No. _____

IN THE
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A. L. LOCKHART, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION ..... *Petitioner*

vs.

DARREL WAYNE HILL ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

A. L. Lockhart, Director, Arkansas Department of Correction, the petitioner, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Eighth Circuit Court of Appeals is reported as *Hill v. Lockhart*, 28 F.3d 832 (8th Cir. 1994), and is reprinted in the appendix to this petition. The opinion of the United States District Court for the Eastern District of Arkansas is reported as *Hill v. Lockhart*, 824 F.Supp. 1327 (E.D. Ark. 1993), and is reprinted in the appendix to this petition. The appendix also includes the Eighth Circuit's August 16, 1994 order denying petitioner Lockhart's petition for rehearing.

JURISDICTION

The Eighth Circuit Court of Appeals issued its opinion in this case on July 5, 1994. Petitioner Lockhart petitioned for rehearing, which was denied by order dated August 16, 1994.

Title 28 U.S.C. § 1254 (1) confers jurisdiction on this Court to review the judgment in question by writ of certiorari.

STATUTORY PROVISIONS INVOLVED

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.
>
> (c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

28 U.S.C. § 2072 (1988).

STATEMENT OF THE CASE

This is a petition for writ of certiorari, brought by petitioner A. L. Lockhart, Director, Arkansas Department of Correction, in which he asks this Court to review the decision of the United States Eighth Circuit Court of Appeals in the case of *Hill v. Lockhart*, 28 F.2d 842 (8th Cir. 1994), *reh'g denied* (Aug. 16, 1994). In *Hill*, the Eighth Circuit Court of Appeals, pursuant to 28 U.S.C. § 1291, partially affirmed a judgment entered by the United States District Court for the Eastern District of Arkansas, conditionally granting habeas corpus relief to respondent Darrel Wayne Hill, a prisoner held on Death Row at the Tucker Unit of the Arkansas Department of Correction.

Hill was convicted in an Arkansas State Court of capital felony murder and attempted capital felony murder, for which he was sentenced to death and to life imprisonment, respectively. Hill was also convicted of each of the felonies underlying the capital and attempted capital murder offenses (two aggravated robberies and two kidnappings), and he was sentenced thereon to enhanced terms of imprisonment; however, those convictions were subsequently vacated as violative of the Double Jeopardy Clause. *Hill v. Arkansas*, 278 Ark. 194, 644 S.W.2d 282 (1983); *Hill v. Arkansas*, 275 Ark. 71, 628 S.W.2d 284 (1982).

At the sentencing phase of Hill's trial, the prosecution introduced five prior felony convictions (two violent, three nonviolent), all of which were offered to enhance the sentences on the robbery, kidnapping and attempted capital murder offenses. Two of the five prior convictions were offered for the additional purpose of establishing (for the capital offense) the aggravating circumstance that Hill had previously committed a violent felony. The jury was appropriately instructed that the three nonviolent felonies

could not be used in consideration of aggravating circumstances for the capital offense, and the prosecutor argued the same.

The mitigating circumstance that Hill had no significant criminal history was also submitted to the jury, and in one brief statement in closing argument, the prosecutor indicated that all five prior convictions could be used to negate that mitigating circumstance. The defense neither objected to the submission of the mitigating circumstance, nor to the prosecutor's statement refuting it in closing. The jury found no mitigating circumstances, but found three aggravating circumstances, one of which concerned the existence of a prior violent felony.

In his habeas petition, Hill attacked these events collectively, asserting that they deprived him of a fair sentencing proceeding. The District Court determined that the submission of six substantive offenses (capital murder, attempted capital murder, two kidnappings and two aggravated robberies), coupled with the prosecutor's use of the three prior nonviolent felonies to negate the mitigating circumstance, resulted in a due process violation. Pursuant to 28 U.S.C. § 2254, the District Court vacated Hill's conviction and death sentence and conditioned the grant of habeas corpus relief on whether the State of Arkansas would retry and resentence Hill. One of the bases on which the District Court premised relief concerned the above-noted ground.

Both petitioner Lockhart and respondent Fretwell appealed the judgment of the United States District Court for the Eastern District of Arkansas to the United States Eighth Circuit Court of Appeals. On the basis of a claim of ineffective assistance of counsel, the Eighth Circuit affirmed that part of the District Court's opinion relevant to Hill's

sentence, but reversed the decision to vacate his conviction.

In its opinion, the Eighth Circuit Court of Appeals refused to consider the question whether the District Court had properly determined that Hill's sentencing proceeding violated due process for the reasons noted above. The Court refused to consider the issue because it was affirming the District Court's resentencing decision on an unrelated issue (ineffective assistance of counsel).

Petitioner Lockhart sought rehearing from the Eighth Circuit, noting that its decision affirming the District Court's order of resentencing violated its own directive that federal habeas courts should decide all issues in a capital case to avoid protracted and piecemeal litigation. Petitioner Lockhart further noted that the affirmance of the District Court's order of resentencing did not obviate the need for a decision on the unresolved sentencing issue, but made a decision necessary to avoid duplicitous litigation of the issue after resentencing. The Eighth Circuit denied rehearing. It is the decision by the United States Eighth Circuit Court of Appeals in *Hill v. Lockhart*, 28 F.3d 832, *reh'g denied* (Aug. 16, 1994) — that the Court did not have to decide the unresolved sentencing issue — that petitioner Lockhart asks this Court to review by writ of certiorari.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI BECAUSE LOWER FEDERAL HABEAS COURTS NEED GUIDANCE CONCERNING THE MANNER IN WHICH THEY DISPOSE OF PROCEEDINGS IN WHICH THEY HAVE GRANTED RELIEF, OR HAVE AFFIRMED THE GRANT OF RELIEF ON AN ISSUE, AND LEAVE REMAINING ISSUES UNRESOLVED — ISSUES WHICH WILL NECESSARILY RECUR AS A RESULT OF THE COURT'S DECISION TO GRANT RELIEF, AND WHICH WILL LIKELY BECOME THE SUBJECT OF HABEAS LITIGATION ANEW, THUS PROMOTING DUPLICITOUS AND PIECEMEAL HABEAS LITIGATION.

This case presents an important procedural question concerning this Court's jurisprudence denouncing protracted and piecemeal litigation in habeas corpus cases, litigation which delays the finality of criminal convictions and increases the already burdensome costs of collateral litigation. The Eighth Circuit Court of Appeals was asked to decide whether the district court erred in determining that Hill's sentencing proceeding warranted habeas corpus relief. The district court determined that the proceeding violated the Due Process Clause because the proceeding combined capital sentencing with non-capital enhancement proceedings in which prior, non-violent felonies were utilized and because underlying felony convictions (which were subsequently vacated by the state courts) were submitted for sentencing. The District Court specifically determined that the use of non-violent felonies for enhancement of the non-capital offense established a non-statutory aggravating circumstance, unconstitutionally supporting the capital sentence.

The Eighth Circuit determined it did not have to

address this sentencing question, although properly presented, because it was affirming the grant of habeas relief on another sentencing issue (ineffective assistance of counsel). Accordingly, the court affirmed the judgment requiring resentencing on both the capital and non-capital offenses, leaving the already litigated, but unresolved sentencing issue to be relitigated after resentencing, thereby promoting duplicitous habeas litigation. The decision clashes with opinions of this Court which direct that the system of criminal justice promote seeking finality of criminal judgments in a prompt and efficient manner.

In furtherance of those procedural norms which this Court has established for dealing with prolonged and piecemeal litigation in the habeas context, and in furtherance of the important policy considerations underlying those procedural norms, should a federal court of appeals decide an issue on which the lower federal court premised habeas relief when, as a result of resentencing ordered by the court of appeals, the issue, if left unresolved, will unquestionably recur and become the subject of habeas litigation anew? In its habeas corpus jurisprudence, this Court has developed a considerable body of law which places a premium on achieving finality in state criminal cases and on curtailing the piecemeal and ever-increasing, protracted nature of habeas litigation. *See, e.g., McCleskey v. Zant*, 499 U.S. 467, 490-92 (1991) (citing *Teague v. Lane*, 489 U.S. 288, 308-09 (1989); *Murray v. Carrier*, 477 U.S. 478, 487 (1986); *Reed v. Ross*, 468 U.S. 1, 10 (1984); *Engle v. Isaac*, 456 U.S. 107, 127 (1982)). This body of law serves not only the states' interests in enforcing criminal judgments, but prisoners' interests in obtaining speedy relief on any meritorious constitutional claims they may have.

> One of the law's very objects is the finality of its judgments. Neither innocence nor just punishment

can be vindicated until the final judgment is known.

McCleskey v. Zant, 499 U.S. at 491.

While the above-noted body of law denouncing protracted and piecemeal litigation has, thus far, been aimed at governing the procedure that a habeas petitioner must follow in presenting his constitutional claims in state courts and in initial federal habeas proceedings, the rationale underlying that body of law creates a similar duty of procedural regularity for the federal judiciary. The same troubling concerns over delay that result from a habeas petitioner's failure to exhaust his habeas claims, or from his failure to present those claims in state court, result from the federal judiciary's refusal to decide those claims after they have been fully litigated in state courts and federal district court and in the briefs in the court of appeals. Arising directly from the need for prompt finality of criminal judgments is the duty imposed upon federal habeas courts "to take all steps necessary to ensure a prompt resolution of the [habeas] matter, consistent with its duty to give full and fair consideration to *all of the issues* presented in the case." *In re Blodgett*, 502 U.S. 236, ___, 112 S.Ct. 674, 676 (1992) (emphasis added).

Other Circuits, "disturbed by the growing number of cases" which leave habeas issues unresolved, have demanded that all issues, especially in capital cases, should be resolved in habeas corpus cases. *See Clisby v. Jones*, 960 F.2d 925, 936 (11th Cir. 1992) (*en banc*) ("we now exercise our supervisory power . . . and instruct the district courts to resolve all claims for relief raised in a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (1988), regardless whether habeas relief is granted or denied."); *King v. McCotter*, 795 F.2d 517, 518 (5th Cir. 1986) (ordering District Court to decide each issue presented in habeas corpus petition), *cert. denied*, 488 U.S. 1019 (1989). *But see*,

Blazak v. Ricketts, 971 F.2d 1408, 1410-11 (9th Cir. 1992) (considering whether order is final and appealable where it grants relief for guilt-phase habeas claims, but does not address sentencing-phase claims; seemingly approving of leaving the latter issues unresolved), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1866 (1994). Indeed, the Eighth Circuit, itself, has noted that a federal habeas court:

> should decide all issues raised by a habeas petition, particularly in death penalty cases. As can surely be concluded here, where the underlying conviction occurred over eighteen years ago, the allowance of piecemeal litigation cannot possibly serve the interests of society, the defendant or the crime victim.

Hulsey v. Sargent, 15 F.3d 115, 119 (8th Cir. 1994) (addressing the district court's refusal to consider all grounds for relief after repeatedly granting relief in piecemeal fashion).

Yet, the three-judge panel in *Hill* ignored *Hulsey*, creating the appearance of a conflict within the Circuit and relying on a false economy which refuses to consider particular issues in a habeas case on the premise that to do so will waste judicial time and resources. In fact, the refusal causes a significant delay in the finality of the criminal conviction by requiring the duplication of litigation and, thus, conserves nothing with respect to judicial time and resources, but only increases the costs.

For example, Respondent Hill was convicted over thirteen years ago. He litigated the unresolved sentencing issue through the state courts and filed his federal habeas petition in 1981, thoroughly litigated the unresolved sentencing issue there and received relief on that ground in 1993. As a direct result of the Eighth Circuit's refusal to

consider the issue, the unresolved sentencing issue will recur upon resentencing for Hill's capital and non-capital crimes, that is, Hill will be resentenced using five prior felony convictions — two to establish an aggravating circumstance for the capital crime and all five to enhance punishment for the non-capital offense.

Thus, the Eighth Circuit's refusal to settle the unresolved sentencing issue actually forces Hill to relitigate the matter in the state and federal courts, duplicating expenditures already made and increasing the very expenditures of time and resources the Eighth Circuit sought to conserve. Unnecessary expenditures occur as a direct result of the Eighth Circuit's refusal to decide the issue, regardless of the results of the decision on the underlying, unresolved sentencing issue. If Hill is ultimately unsuccessful on the issue, the matter could have been decided in the first instance by the Eighth Circuit, entirely avoiding the costs of relitigation. And if Hill is successful on the unresolved sentencing issue, his sentence will once again be deemed constitutionally invalid, and Hill and the State will be ordered to endure yet a third sentencing proceeding. Finally, if the State were successful at having the Eighth Circuit's current decision ordering resentencing overturned, the unresolved sentencing issue still looms to be decided.

This Court has general supervisory power over inferior federal courts. 28 U.S.C. § 2072 (1988). The supervisory powers of this Court may be exercised either by the promulgation of general rules or by the announcement of a rule of decision in a particular case. *United States v. Hasting*, 461 U.. 499, 505 (1983); *Hawkins v. United States*, 358 U.S. 74, 78 (1958), *overruled on other grounds, Trammel v. United States*, 445 U.S. 40 (1980). This is an appropriate case in which to exercise supervisory powers.

The practice of refusing to decide all issues in habeas corpus cases is not a matter unique to this case. Rather, this is a matter which plagues habeas corpus practice. *See, e.g., Hulsey v. Sargent*, 15 F.3d 115, 119 (8th Cir. 1994); *Clisby v. Jones*, 960 F.2d 925, 936 (11th Cir. 1992) (collecting cases). The respondent does not ask this Court to impose a broad rule that all issues in every habeas corpus proceeding must be decided. Rather, respondent Lockhart seeks a rule that all issues be decided in that narrow group of cases in which the issues left undecided are likely to recur as a result of the dispositive action taken by the reviewing court — i.e., when the court orders resentencing. The exercise of supervisory powers in this case will provide this Court with the opportunity to give the lower federal courts much needed guidance for reviewing criminal/habeas cases where the death penalty is imposed when those courts give consideration to habeas cases in what amounts to a piecemeal fashion — a result strictly prohibited in habeas corpus matters. *E.g.*, Rule 9, Rules Governing Section 2254 Cases in the United States District Courts.

CONCLUSION

Petitioner Lockhart respectfully requests that this Court grant the instant application for the writ of certiorari and that this Court review the decision of the United States Eighth Circuit Court of Appeals in the case of *Hill v. Lockhart*, 28 F.3d 832 (8th Cir. 1994), or that this Court grant summary disposition pursuant to Sup. Ct. R. 16.1, directing the Eighth Circuit Court of Appeals to address the unresolved sentencing issue.

Respectfully submitted,

WINSTON BRYANT
ARKANSAS ATTORNEY GENERAL

BY: *OLAN W. REEVES
SENIOR ASSISTANT ATTORNEY GENERAL
ARKANSAS BAR NO. 85136
200 TOWER BUILDING
323 CENTER STREET
LITTLE ROCK, ARKANSAS 72201
(501) 682-8078

Attorneys for Petitioner
*COUNSEL OF RECORD

APPENDIX

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

Nos. 93-2894/93-3159

Darrel Wayne Hill,	★	
	★	
Appellee/Cross-Appellant,	★	
	★	Appeals from the
v.	★	United States District
	★	Court for the Eastern
A. L. Lockhart, Director,	★	District of Arkansas.
Arkansas Department of Correction,	★	
	★	
Appellant/Cross-Appellee.	★	

Submitted: March 17, 1994

Filed: July 5, 1994

Before McMILLIAN, BOWMAN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

In February, 1980, in the course of a robbery of a gasoline station in Pencil Bluff, Arkansas, Darrel Wayne Hill kidnapped E. L. Ward, the owner of the service station, and Donald Teague, an officer of the Arkansas Game and Fish Commission who had walked into the service station office during the robbery. Mr. Hill stole money from each man and subsequently shot each man at least twice at close range. Mr. Ward survived, but Mr. Teague died. (We recount these facts as undisputed, since Mr. Hill has not challenged, in the case before us, the sufficiency of the evidence against him.)

In connection with those events, Mr. Hill was charged

with six crimes in state court in Arkansas in February, 1980. He pleaded not guilty by reason of insanity. A jury convicted him of all six crimes in July, 1980. Mr. Hill was sentenced to life in prison for the attempted murder of Mr. Ward; he was sentenced to death for the murder of Mr. Teague. He was also sentenced to 50 years in prison for each of the other four crimes — two counts of kidnapping and two counts of robbery.

On direct appeal, the Arkansas Supreme Court vacated the convictions for kidnapping and robbery related to Mr. Teague, holding that they were lesser included offenses of the murder charge. *See Hill v. State*, 628 S.W.2d 284, 287 (Ark. 1982), *cert. denied*, 459 U.S. 882 (1982). On a petition for postconviction relief, the Arkansas Supreme Court vacated the convictions for kidnapping and robbery related to Mr. Ward, holding that they were lesser included offenses of the attempted murder charge. *See Hill v. State*, 644 S.W.2d 282, 284-85 (Ark. 1983) (*per curiam*).

In late 1982, Mr. Hill petitioned in federal district court for habeas corpus relief under 28 U.S.C. § 2254. In early 1989, he filed an amended petition (the interim delay occurred by agreement of the parties, pending decisions by the Supreme Court on several cases involving the Arkansas death penalty). Mr. Hill alleged that he had received ineffective assistance of counsel in several respects in his state court trial; he also contended that the state trial court had erred in denying a motion for change of venue and in allowing the jury to consider certain prior convictions when determining the sentence to be imposed on the murder charge.

In mid-1993, the district court granted Mr. Hill's petition on the grounds that he had received constitutionally significant ineffective assistance of counsel during

both the guilt phase and the penalty phase of his state court trial with regard to his extensive history of mental illness, *see Hill v. Lockhart*, 824 F. Supp. 1327, 1343-44 (E.D. Ark. 1993), and that the state trial court had erred to a constitutionally significant degree in allowing the jury to consider certain of Mr. Hill's prior convictions for sentencing purposes on the murder charge, *see id.* at 1335-37, 1344. The district court held, however, that Mr. Hill had not been deprived of due process by the state trial court's denial of a motion for change of venue. *See id.* at 1333. Because of its holdings with respect to ineffective assistance of counsel and the use of certain prior convictions, the district court vacated Mr. Hill's convictions and sentences for both the attempted murder of Mr. Ward and the murder of Mr. Teague. *See id.* at 1345. The district court then ordered the state either to retry Mr. Hill on those charges or to release him. *See id.*

The state appeals the district court's rulings on ineffective assistance of counsel and the use of certain prior convictions. Mr. Hill cross-appeals the district court's ruling on the venue motion. We reverse the district court with respect to ineffective assistance of counsel at the guilt phase of Mr. Hill's state court trial. We affirm the district court, however, with respect to ineffective assistance of counsel at the penalty phase of that trial. On Mr. Hill's cross-appeal, we affirm the district court with respect to the venue motion. Because of our holdings, we need not reach the issue involving the use of certain prior convictions in sentencing on the murder charge.

We therefore reinstate Mr. Hill's convictions for both the attempted murder of Mr. Ward and the murder of Mr. Teague. We vacate, however, Mr. Hill's sentences of life in prison for the attempted murder of Mr. Ward and death for the murder of Mr. Teague, and we direct the district court

to order the state to retry the question of penalty on both of those charges.

I.

The essence of Mr. Hill's claim with respect to ineffective assistance of counsel in his amended petition for habeas relief is that he had a long history of mental illness that should have been more thoroughly investigated before his state court trial and then explored in detail at that trial, both during the guilt phase, to support his defense of insanity, and at the penalty phase, to serve as mitigating circumstances. The state's response to the petition contended that Mr. Hill had failed to present to the state courts the issue of ineffective assistance of counsel at the guilt phase, and therefore that that ground was procedurally defaulted and could not be considered by the federal courts unless Mr. Hill showed cause for his default and prejudice arising from that default. *See, e.g., Wainwright v. Sykes*, 433 U.S. 72, 85, 87, 90-91 (1977); *see also Engle v. Isaac*, 456 U.S. 107, 110, 129 (1982). (The state concedes that Mr. Hill presented the issue of ineffective assistance of counsel at the penalty phase.) On appeal of the district court's rulings, the state argues that Mr. Hill never showed either cause or prejudice for his default on the issue with respect to the guilt phase and therefore that the district court erred in addressing that issue on its merits.

We consider first the question of whether Mr. Hill failed to present to the state courts the issue of ineffective assistance of counsel at the guilt phase of his state court trial. "A federal court may consider the merits of a claim made in a habeas corpus petition if the petitioner has fairly presented to the state courts the substance of his claim." *Guinan v. Armontrout*, 909 F.2d 1224, 1227 (8th Cir. 1990), *cert. denied*, 498 U.S. 1074 (1991). "The same factual arguments and legal theories should be present in both the state and federal

claims." *Kenley v. Armontrout*, 937 F.2d 1298, 1302 (8th Cir. 1991), *cert. denied*, 112 S.Ct. 431 (1991).

In Mr. Hill's petition for postconviction relief to the Arkansas Supreme Court, he referred to his lawyers' failure to present evidence of his psychiatric hospitalization and subsequent outpatient treatment in Oklahoma just a few months before the events for which he was convicted in state court. Although that reference was in a paragraph focusing primarily on his lawyers' failure to present that evidence during the penalty phase of his state court trial, he does plainly state that the evidence was "relevant [and] admissible . . . at both the guilt and penalty phases of the trial" and "could have supported the defense of insanity as well as mitigating circumstances," *i.e.*, "diminished capacity."

"Significantly, the legal analysis to be applied by this court" to Mr. Hill's claim, *i.e.*, ineffective assistance of counsel related to failure to present evidence of an extensive history of mental illness is "the same regardless of which of the discrete aspects" of the state court trial is at issue — the guilt phase or the penalty phase. *Guinan*, 909 F.2d at 1227. "The question of mental condition," moreover, "cannot be neatly divided into sanity at the time of the offense as the relevant issue at the guilt phase, and mitigating evidence as the relevant issue at sentencing. . . . [A criminal defendant's] intellectual understanding of his actions and their gravity [is] . . . clearly in issue at both phases of the proceedings." *Starr v. Lockhart*, No. 92-1466, slip op. at 15-16 n.7, 1994 U.S. App. LEXIS 9554 at *27 n.7, 1994 WL 157669 at *13 n.7 (8th Cir. May 2, 1994). The state apparently does not dispute that Mr. Hill presented sufficient facts with respect to ineffective assistance of counsel in general to the Arkansas Supreme Court. The only issue for this court is whether the reference to the guilt phase of Mr. Hill's state court trial in his petition for postconviction relief was "sufficient to fairly

apprise the Arkansas Supreme Court" of Mr. Hill's claim with respect to that phase of his state court trial. *Snell v. Lockhart*, 14 F.3d 1289, 1298 (8th Cir. 1994).

After careful consideration, we believe that even though Mr. Hill "did not precisely articulate the issue in the state court, . . . he fairly presented both the factual and legal bases of the claim" regarding ineffective assistance of counsel at the guilt phase to the state supreme court. *Bannister v. Armontrout*, 4 F.3d 1434, 1440 (8th Cir. 1993), *petition for cert. filed* (May 27, 1994). In other words, we believe that the necessary " 'arguable factual commonality,' " *Kenley*, 937 F.2d at 1303, quoting *Laws v. Armontrout*, 863 F.2d 1377, 1387 n.10 (8th Cir. 1988) (*en banc*), *cert. denied*, 490 U.S. 1040 (1989), exists between the claims presented by Mr. Hill in the state courts and those stated in his federal petition for habeas relief. *See, e.g., Snell*, 14 F.3d at 1299 ("the brief in this case explicitly cited the due process clause," and the state courts "could easily have recognized that included within the myriad claims of undue prejudice was a claim . . . [for] denial of due process"), and *Guinan*, 909 F.2d at 1227 ("[i]n substance the claims . . . are obviously closely related"); *see also Eldridge v. Atkins*, 665 F.2d 228, 232 (8th Cir. 1981), *cert. denied*, 456 U.S. 910 (1982) ("the record as it relates to the claim of ineffective counsel cannot be divided piecemeal when the question is whether an individual has been wrongfully convicted"). We therefore hold that Mr. Hill has not defaulted that claim and that the district court was correct to consider the merits of that claim. We turn, then, to an evaluation of the merits of Mr. Hill's claim of ineffective assistance of counsel at both the guilt phase and the penalty phase of his state court trial.

II.

As noted above, the basis for Mr. Hill's claim of ineffective assistance of counsel is that his lawyers failed to

investigate and present his extensive history of mental illness, which could have been used in his state court trial to support his insanity defense during the guilt phase and his offer of mitigating circumstances during the penalty phase. At the time of his arrest on state charges in Arkansas in February, 1980, Mr. Hill had been hospitalized for psychiatric evaluation at least four times — for a week in early 1968 in Oklahoma; for five months in spring and summer, 1968, in Missouri; for a month in mid-1970 in Oklahoma; and for two and a half months in summer, 1979, in Oklahoma. In addition, the record reflects that he had been placed on a psychiatric ward while in prison at least four times — for a year in the mid-1960s, and for periods of one month, three and a half months, and one month in the early 1970s. Because of the nature of this case, we relate some details of several of those hospitalizations.

Mr. Hill committed himself voluntarily in 1968 to an Oklahoma hospital. He was 27 years old at that time and had been released a month earlier from a term in prison. According to hospital records, both Mr. Hill and his wife stated that he had been diagnosed as a paranoid schizophrenic while in prison. The doctor's notes on the day of admission reflect that Mr. Hill was "anxious, feels unreal, in a dream world, hearing voice of his dead father telling him 'This isn't the answer,' 'you're going to be killed anyway, you should kill yourself.' "

A history taken by two doctors four days after Mr. Hill's admission states that Mr. Hill "believes much of his problems center around the death of his father several years ago . . . [when Mr. Hill] was burglarizing a safe . . . and . . . went after his father to help [him] load [the safe] on a truck. On their return . . . the law was there, [Mr. Hill and his father] turned around and left . . ., the police followed them

and found them. . . . The police fired and struck his father, and his father died the next day. The patient himself got away. . . . This man says that he has been hearing voices in his head for several years, . . . mostly they are his father telling him that he is going to be killed, that he will meet some sort of violent death, and that he should kill himself because he is about to die anyway. He had one vision of his father while in prison, also while he was in prison, an inmate was stabbed to death and shortly [there]after this inmate appeared to him . . . and told him that he would die the same way. He believes he had a great number of enemies at the penitentiary, and numbers of the inmates are for various reasons following him and [plotting] to kill him. This or else they have friends presently outside who are planning to kill him. . . . He can't sleep, feels extremely panicky, extremely anxious, and is constantly afraid that he will be killed. . . . He does not believe his voices are real but they exist only in his imagination, the ideas that his life is in danger he very definitely believes. . . . He . . . feels that people talk about him and laugh at him, feels that many people are planning to kill him."

While at the hospital, Mr. Hill was given anti-psychotic drugs. Within four days, the history taken by the two doctors recounts, he "[said] that he feels better and that his hallucinations have quit." After a week in the hospital, Mr. Hill left without telling anyone. The notes closing his case give diagnoses of "[s]ociopathic personality, antisocial type, with alcoholism and drug addiction" and "[s]chizophrenic reaction, paranoid type."

In mid-1970, when he was 29 years old, Mr. Hill was sent for observation to a second Oklahoma hospital. That admission was by court order for evaluation of his competency; he was facing robbery charges at that time. A psychological evaluation conducted two days after

Mr. Hill's admission states that "all in all, the test results indicate both sociopathic tendencies with schizy underpinnings and [that] he has the potential for unpredictable, possibly at times violent behavior." Two staff doctors interviewed Mr. Hill approximately three weeks after his admission to the hospital. Their impression was that Mr. Hill "is not undergoing an acute psychotic episode at this time." Their diagnosis was "[a]ntisocial personality." The hospital released Mr. Hill to the court four days later.

In mid-1979, while facing charges of car theft, Mr. Hill was interviewed in jail in Oklahoma by a psychiatrist at the request of the court. Mr. Hill was 38 years old at that time. The doctor's notes reflect that "[i]n the 1960's the prisoner was in [a hospital in Missouri] for [p]aranoid [s]chizophrenia and was placed on anti-psychotic drugs. During his last imprisonment . . . he spent most of his time in the psychiatric unit until it was burned and then in isolation from the general prison population. He was on [anti-psychotic drugs while in prison]. He quit his drugs after release from prison." The doctor made a preliminary diagnosis of paranoid schizophrenia and recommended hospitalization "for care and treatment," since "it is felt that [Mr. Hill] cannot properly understand charges currently pending and would have difficulty cooperating with his attorney in his defense."

Four days later, Mr. Hill was admitted by court order to a hospital in Oklahoma. The admission notes state that Mr. Hill "is very delusional with ideas of persecution, the [p]olice want to kill him and they were putting poison on his food while in jail. Admit[s] to hav[ing] auditory hallucinations, talk[s] to his dead father and his father answer[s] to him."

Upon admission, Mr. Hill began a regimen of anti-

psychotic drugs. After about a month of hospitalization, according to Mr. Hill's release summary, Mr. Hill's doctor "discontinued all medications to evaluate [Mr. Hill's] behavior. After the medication was discontinued, the patient became psychotic again, therefore, [the doctor] placed him on medication again. He started to improve . . . [and continued to improve], and he became friendly and cooperative, socialized well with others, and did not cause any problems on the ward. . . . His delusions disappeared as well as his auditory hallucinations."

Mr. Hill was released to the court after two and a half months. At discharge, his release summary stated, Mr. Hill was "no longer psychotic, . . . in good contact with reality, and his delusions and hallucinations [had] disappeared." His final diagnoses were "[s]chizophrenia, paranoid type," "[a]lcohol addiction," and "[d]rug dependency (LSD, amphetamines, heroin, cocaine, opium, marijuana, and others)."

The notes of Mr. Hill's outpatient treatment in Oklahoma after his release indicate that he was seen monthly from mid-August through mid-December, 1979, and continued to take his anti-psychotic drugs. In mid-January, 1980, however, he failed to keep his scheduled appointment. He was arrested in Arkansas three weeks later — after the robbery of Mr. Ward's service station, the attempted murder of Mr. Ward, and the murder of Mr. Teague.

III.

"[T]he purpose of the effective assistance guarantee [in the sixth amendment] is . . . simply to ensure that criminal defendants receive a fair trial." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). "The benchmark for judging any claim of [constitutionally significant] ineffectiveness [of counsel] must be whether counsel's conduct so undermined

the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. The same principle applies to a capital sentencing proceeding." *Id.* at 686.

A petitioner's claim "that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the [petitioner] must show that counsel's performance was deficient. . . . Second, the [petitioner] must show that the deficient performance prejudiced the defense." *Id.* at 687. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id.* at 700.

A reviewing court's task with respect to attorney performance is to "determine whether, in light of all the circumstances, the [lawyer's performance was] outside the range of professionally competent assistance." *Id.* at 690. "Reasonable performance of counsel includes an adequate investigation of facts, consideration of viable theories, and development of evidence to support those theories." *Foster v. Lockhart*, 9 F.3d 722, 726 (8th Cir. 1993); *see also Eldridge v. Atkins*, 665 F.2d 228, 232 (8th Cir. 1981), *cert. denied*, 456 U.S. 910 (1982).

"The purpose of the . . . guarantee of counsel [in the sixth amendment] is to assure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Strickland*, 466 U.S. at 691-92. "The defendant must [therefore] show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine

confidence in the outcome." *Id.* at 694. "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695.

In one case, the Supreme Court has intimated very obliquely that even after deficient performance and sufficient prejudice have been shown with respect to an ineffectiveness claim, a reviewing court should then consider an additional harmless-error analysis. *See Lockhart v. Fretwell,* 113 S.Ct. 838, 842-43 n.2 (1993) ("[h]armless error analysis is triggered only *after* the reviewing court discovers that [a trial] error [of constitutional magnitude] has been committed. . . . Since we find no constitutional error, we need not . . . consider harmlessness") (emphasis in original). In *Starr v. Lockhart,* No. 92-1466, slip op. at 19, 1994 U.S. App. LEXIS 9554 at *33, 1994 WL 157669 at *10 (8th Cir. May 2, 1994), the court stated that ineffective assistance claims are trial errors — that is, errors that occur "during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether [the error] was harmless," *Arizona v. Fulminante,* 499 U.S. 279, 307-08 (1991), rather than errors that amount to "structural defects in the constitution of the trial mechanism" that affect "the framework within which the trial proceeds," *Id.* at 310.

Under the oblique intimation in *Lockhart v. Fretwell,* then, a reviewing court in a habeas case would, presumably, have to consider whether any constitutionally significant

ineffectiveness claim was also harmless under the test enunciated in *Brecht v. Abrahamson*, 113 S.Ct. 1710, 1714 (1993), for trial errors in habeas cases ("whether the . . . error 'had substantial and injurious effect or influence in determining the jury's verdict' "), quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946); *see also Brecht*, 113 S.Ct. at 1722. We have found no cases, however, where a reviewing court actually considered the question of harmless error after finding constitutionally significant ineffective assistance of counsel in a habeas case.

One court has explicitly concluded, moreover, that the prejudice question addressed as part of the ineffective assistance claim is essentially the same inquiry made in a harmless-error analysis. *See Smith v. Dixon*, 14 F.3d 956, 974, 976 (4th Cir. 1994) (*en banc*) ("for all of the *same* reasons fully set forth . . . [in the part of the opinion] addressing harmless error, [the defendant] is unable to show actual prejudice as a result of his attorney's failure to raise the heinousness claim on direct appeal"; "[i]t would be illogical to hold, on the one hand, that we are able to assess the effect of the error for purposes of deciding prejudice under *Strickland* . . . but find that we are unable to evaluate the effect of this error in determining prejudice for purposes of harmless error analysis. . . . this court must be qualified to assess the prejudicial impact of an unconstitutionally vague instruction on an aggravating factor because we are already required to conduct this *same* type of evaluation in the context of determining prejudice under *Strickland*") (emphasis supplied).

We too believe that the prejudice inquiry necessary to determine whether a criminal defendant has received constitutionally significant ineffectiveness of counsel (whether a "probability sufficient to undermine confidence in the outcome" exists "that, but for counsel's unprofessional

errors, the result of the proceeding would have been different"), *Strickland*, 466 U.S. at 694, is analogous to the harmless-error analysis applicable to trial errors in habeas cases (whether the error " 'had substantial and injurious effect or influence in determining the jury's verdict' "), *Brecht*, 113 S.Ct. at 1714, quoting *Kotteakos*, 328 U.S. at 776. Absent more explicit direction from the Supreme Court, therefore, we hold that it is unnecessary to add a separate layer of harmless-error analysis to an evaluation of whether a petitioner in a habeas case has presented a constitutionally significant claim for ineffective assistance of counsel. We turn, then, to an evaluation of the investigation of Mr. Hill's history of mental illness and the presentation of his insanity defense during the guilt phase of his state court trial.

IV.

The state trial court appointed a lawyer for Mr. Hill on February 13, 1980. About a week later, the lawyer moved for a psychiatric examination of Mr. Hill and gave notice to the state that Mr. Hill might raise insanity as a defense. *See* Ark. Code Ann. § 5-2-304(a). To prevail on an insanity defense, Mr. Hill had to prove, by a preponderance of the evidence, that at the time of the events in question, "as a result of mental disease or defect," he lacked the capacity to "conform his conduct to the requirements of law or to appreciate the criminality of his conduct." *See* Ark. Code Ann. § 5-2-312(a) and Ark. Code Ann. § 5-1-111(d); *see also* AMI Criminal, 4009 (1982). On March 14, Mr. Hill was sent by order of the state trial court for psychiatric evaluation in an Arkansas hospital.

By letter of March 8, Mr. Hill had advised his lawyer of his 1968 hospitalization in Oklahoma, his 1979 hospitalization in Oklahoma, his 1979 outpatient treatment in Oklahoma, and his placements on a psychiatric ward in prison in the mid-1960s and early 1970s. On March 27,

Mr. Hill's lawyer wrote to the Arkansas hospital and advised them of Mr. Hill's 1979 hospitalization and outpatient treatment in Oklahoma. The lawyer also related that anti-psychotic drugs had been prescribed for Mr. Hill but that he had quit taking them "for a period of some weeks" before the events for which he was arrested. Mr. Hill's lawyer also told the hospital that Mr. Hill had been diagnosed during his Oklahoma hospitalization as "an acute paranoid schizophrenic."

On April 11, Mr. Hill was released to the court, the Arkansas hospital doctors having diagnosed him as being drug-dependent but without psychosis. On April 17, about a week after Mr. Hill's release, his lawyer moved for a court order to obtain the Arkansas hospital records. When asked, during the evidentiary hearing in federal court on the habeas petition, why he did not also move for a court order to obtain Mr. Hill's medical records from Oklahoma at that time, Mr. Hill's lawyer stated, "I simply have no explanation to give on that. I don't know." He later suggested, however, that he might have been under the impression that Mr. Hill's Oklahoma medical records would be included in the Arkansas hospital materials. On May 1, the Arkansas hospital sent its records to Mr. Hill's lawyer. Those records did not include anything related to Mr. Hill's Oklahoma hospitalizations or outpatient treatment.

The state trial court held a motion hearing on May 22. During that hearing, Mr. Hill's lawyers (the state trial court had appointed an additional lawyer for Mr. Hill sometime between mid-March and mid-April) stated that they had requested Mr. Hill's medical records from Oklahoma but had not received them, said that they were not sure yet if Mr. Hill would raise insanity as a defense, and asked the state trial court to authorize a second psychiatric evaluation of Mr. Hill. The state court, noting that trial was then set for

June 9, refused to do so, saying that the grounds were not sufficient at that time but that Mr. Hill's lawyers could renew their request once they received the medical records from Oklahoma. The state trial court then declared that Mr. Hill was competent to stand trial.

Mr. Hill had told his first lawyer as early as March 8 about his 1968 hospitalization, his 1979 hospitalization, and his 1979 outpatient treatment in Oklahoma and about his placements on a psychiatric ward while in prison. The lawyers had received Mr. Hill's records from the Arkansas hospital on May 1 and therefore knew at that time that those records contained nothing about the Oklahoma hospitalizations and outpatient treatment. Nonetheless, and in spite of the lawyers' representation to the state trial court on May 22 that they had requested Mr. Hill's Oklahoma medical records, they did not actually do so until May 27, only two weeks before the scheduled trial date.

Mr. Hill's lawyers finally received his Oklahoma medical records on June 10. (By that time, the state court had postponed the trial until July 7, but only because one of Mr. Hill's lawyers had been called to active duty in the military for two weeks.) The Oklahoma medical records sent to Mr. Hill's lawyers contained, according to the cover letter accompanying them, the doctor's notes from the interview with Mr. Hill in jail in Oklahoma in 1979, the admission notes for Mr. Hill's hospitalization in Oklahoma in 1979, the release summary from that hospitalization, and the notes from Mr. Hill's outpatient treatment in Oklahoma in 1979, plus the psychological evaluation made at the beginning of Mr. Hill's hospitalization in Oklahoma in 1970 and the staff doctors' notes from their interview with Mr. Hill approximately three weeks later. The records included nothing from Mr. Hill's 1968 hospitalization in Oklahoma. The records that were sent, however, did suggest

that Mr. Hill may have been schizophrenic as erarly as 1970, that he responded to anti-psychotic drugs, and, most importantly, that he regressed to a psychotic state when he quit taking those drugs. The substance of those records is described in more detail in section II of this opinion.

The state court trial was then set for July 7. Although Mr. Hill's first lawyer acknowledged, in the evidentiary hearing in federal court on the habeas petition, that he had obtained in February or March the names of psychiatrists and psychologists whom the defense might consider using, it was not until June 27 that Mr. Hill's lawyers moved again for a second psychiatric evaluation of Mr. Hill to refute the conclusions of the doctors at the Arkansas hospital. On July 4, a clinical psychologist appointed by the state trial court visited Mr. Hill in jail for slightly over an hour.

Mr. Hill's state court trial began on July 7. During the guilt phase of that trial, his lawyers called only the clinical psychologist who had interviewed Mr. Hill in jail. They called none of the doctors who had examined Mr. Hill during any of his hospitalizations, outpatient treatment, or placements on a psychiatric ward in prison. Nor did they introduce any of Mr. Hill's medical records related to those events, although those records would have been admissible. *See* Ark. R. Ev. 803(3), 803(4), and 803(6). Nor did they explore, through the clinical psychologist's testimony, the fact that Mr. Hill responded to anti-psychotic drugs or the fact that he regressed to a psychotic state when he stopped taking those drugs.

Mr. Hill's first lawyer stated, during the evidentiary hearing in federal court on the habeas petition, that he had contacted only one or two of the five doctors who were named in Mr. Hill's medical records from Oklahoma. He offered no explanation of why he did not contact the others.

When asked why he had not called as witnesses any of the doctors he had contacted after reading Mr. Hill's medical records from Oklahoma, Mr. Hill's first lawyer stated that he had "received a highly negative impression of their potential testimony" and that the testimony "would have been highly defensive in nature," reflecting the doctors' need to, "in a sense, justify letting Mr. Hill out." The lawyer also remarked that "one of them . . . was not highly articulate in the English language, and . . . would be a terrible witness." When asked, then, why Mr. Hill's medical records from Oklahoma were not introduced through the clinical psychologist who did testify for the defense, Mr. Hill's lawyer could offer no explanation.

In that evidentiary hearing, Mr. Hill's first lawyer also alluded to his reluctance to "plac[e] [Mr. Hill's] criminal record or prison record in front of the jury or [to] open[ ] the door to . . . such evidence" through Mr. Hill's medical records from Oklahoma. The lawyer conceded that none of the details of Mr. Hill's criminal history were actually in the records but suggested that the state might have introduced that history in rebuttal in some way. The lawyer also suggested that he had been concerned about "prior bad acts" by Mr. Hill aside from his criminal history. The lawyer acknowledged, however, that none of the instances he cited was contained in Mr. Hill's medical records from Oklahoma.

At that evidentiary hearing, the court accepted as an expert in capital litigation a lawyer with extensive experience in capital cases. That lawyer testified that with "a history of prior hospitalization related . . . early on by your client," a lawyer defending that client would "want to get the records" "as soon as possible." He also testified that in cases where a court-ordered psychiatric evaluation was unfavorable to the defense, a defense lawyer would "need to

find some expert testimony" to refute the conclusions of the court-ordered evaluation. Neither of those tasks, he suggested, was performed in Mr. Hill's case "until the last minute." The lawyer then stated that he could think of no "proper tactical reason" why Mr. Hill's lawyers would not have introduced the medical records from Oklahoma.

The insanity defense explicitly presented at the state court trial was that Mr. Hill was a paranoid schizophrenic who manifested his illness by being likely to react in an "uncontrolled violent outburst" to a person in uniform. After the state brought out in cross-examination that neither Mr. Ward nor Mr. Teague was wearing a uniform at the time of the events in question, Mr. Hill's lawyers asked the psychologist if a paranoid schizophrenic such as Mr. Hill would be likely to erupt in response to a "symbol of something in authority," namely, the insignia of the Arkansas Game and Fish Commission on the side of Mr. Teague's vehicle. The psychologist said, "Yes, any symbol of authority."

The state offered in rebuttal the psychiatrist who had evaluated Mr. Hill during Mr. Hill's four-week stay at the Arkansas hospital. That psychiatrist testified that he had found Mr. Hill to be "without [p]sychosis" at the time of evaluation. He also stated that his opinion was that "at the time of the alleged offense, Mr. Hill probably had the capacity to conform his actions to the requirements of the law." In response to cross-examination by Mr. Hill's lawyers, the psychiatrist related that once Mr. Hill denied being "crazy" or "sick," "the onus was on him [Mr. Hill] to prove to me that he was schizophrenic." Mr. Hill's lawyers did not explore, with the psychiatrist, any effect on Mr. Hill of anti-psychotic drugs or of his failure to take such drugs.

We consider first whether the performance of Mr. Hill's

lawyers was "outside the range of professionally competent assistance," *Strickland v. Washington*, 466 U.S. 668, 690 (1984), with respect to the investigation of Mr. Hill's history of mental illness and the presentation of his insanity defense at his state court trial. It is true that Mr. Hill's lawyers did not obtain all of his medical records before trial and that they never introduced the medical records that they did have. Nonetheless, much of the most useful information included in those records was alluded to in the testimony of the clinical psychologist who testified for the defense.

For example, with respect to Mr. Hill's history of mental illness and its specific manifestations in his case, the psychologist stated that he had diagnosed Mr. Hill as a paranoid schizophrenic and described paranoid schizophrenia as a psychosis "characterized by delusions, typically . . . delusions of persecution where [the afflicted person] might believe that someone or large numbers of people are out to get them." The psychologist stated that one of the tests that he administered to Mr. Hill "indicate[d] the possibility of acute turmoil, that the person is actively psychotic." Mr. Hill's responses to two other tests suggested "weakening ties with reality" and "forces outside of his control within the personality that tend to be pulling him apart," according to the psychologist. The psychologist also remarked that he had reviewed Mr. Hill's 1970 and 1979 hospital records from Oklahoma and that those records also described Mr. Hill as having a "schizoid personality" and reflected a diagnosis of paranoid schizophrenia.

With respect to whether Mr. Hill was insane at the time of the events in question, the psychologist testified that because Mr. Hill's medical records suggested a history of chronic paranoid schizophrenia, it would be reasonable to "assume that [Mr. Hill] has been to some degree [a] paranoid schizophrenic for a long time," including the

period of the events in question. The psychologist stated that "within [Mr. Hill's] delusional system . . . he is unable to appreciate the criminality of his act . . . and in that sense he is unable to distinguish right from wrong." The psychologist further stated that "within [Mr. Hill's] delusional system," Mr. Hill "cannot" conform his conduct to what the law requires" and is "psychotic." Finally, with respect to the effect of anti-psychotic drugs on paranoid schizophrenics, the psychologist noted that "paranoid[ ] [schizophrenics] . . . have the characteristic of believing that they are okay and the rest of the world is wrong and so when you put them on medications, they only take them as long as they're under supervision . . . and what happens is [that] as soon as they are released from very direct, supervised psychiatric care, they get off their medication and the psychosis comes back again."

In short, although Mr. Hill's lawyers did not present his insanity defense explicitly on the theory that he was insane at the time of the events in question primarily because he had stopped taking anti-psychotic drugs, the psychologist's testimony did cover, either directly or by inference, most of the facts that would be essential to support that theory. Unfortunately, the primary facts not presented were that Mr. Hill himself had a history of positive response to anti-psychotic drugs; that he had been taking anti-psychotic drugs regularly between at least mid-June and mid-December, 1979; that he had responded to them; and that he had missed an outpatient appointment to receive those drugs in mid-January, 1980 — about three weeks before the robbery of Mr. Ward's service station, the attempted murder of Mr. Ward, and the murder of Mr. Teague.

It seems to us that the defense of insanity caused by Mr. Hill's failure to continue taking anti-psychotic drugs

was an obvious one. Indeed, the letter from Mr. Hill's first lawyer to the Arkansas hospital related the facts that would be relevant to that defense, indicating, to us, that the lawyer found them significant even at that early time. The written report of the clinical psychologist who testified for the defense also comments that "[i]t is clear that [Mr. Hill] does much better on antipsychotic medication, but as is typical with paranoid schizophrenics, will not take that medication unless forced to. Left in an unstructured situation, it is apparent that medication will be discontinued and the probability of a psychotic episode again becomes very high." That report also summarized the episode (contained in the medical records that the psychologist reviewed) in which Mr. Hill "improved on antipsychotic medications and was then discontinued" from those drugs, whereupon he "rapidly became psychotic again" until he "was replaced on the medication" and again improved. The clinical psychologist's written report was dated two days before Mr. Hill's state court trial, yet Mr. Hill's lawyers neither introduced it at the trial nor questioned the clinical psychologist about those parts of it.

It does not appear to us that Mr. Hill's lawyers "consider[ed] viable theories," *Foster v. Lockhart*, 9 F.3d 722, 726 (8th Cir. 1993), that clearly were available at the time those lawyers were preparing Mr. Hill's insanity defense. *See also Eldridge v. Atkins*, 665 F.2d 228, 232 (8th Cir. 1981), *cert. denied*, 456 U.S. 910 (1982) (" '[i]t is the duty of the lawyer to . . . explore all avenues leading to facts relevant to . . . degree of guilt' "), quoting American Bar Association Project on Standards for Criminal Justice, *Standards Relating to the Prosecution Function and the Defense Function* § 4.1 (approved draft 1971). The medical records that Mr. Hill's lawyers had, unlike those in several other cases, would have provided considerable substantiation for the presentation of an insanity defense based on

Mr. Hill's failure to continue taking anti-psychotic drugs. *Compare Whitmore v. Lockhart*, 8 F.3d 614, 617 (8th Cir. 1993), *petition for cert. filed* (May 11, 1994), and *Laws v. Armontrout*, 863 F.2d 1377, 1390 (8th Cir. 1988) (*en banc*), *cert. denied*, 490 U.S. 1040 (1989). In addition, that theory of defense would have been considerably more believable than the one actually presented — that Mr. Hill erupted in unpredictable and violent response to the insignia of the Arkansas Game and Fish Commission on the side of Mr. Teague's vehicle. The mere offering of the theory with respect to the insignia, we believe, virtually guaranteed that the jury would discount Mr. Hill's claim of insanity.

It appears to us not only that Mr. Hill's lawyers failed to present a defense that would have been both credible and well documented by Mr. Hill's medical history, but also that the defense that *was* offered was barely believable at best and, even worse, not documented by Mr. Hill's medical history. Under those circumstances, we do not believe that the performance of Mr. Hill's lawyers was within the range of "professionally competent assistance," *Strickland*, 466 U.S. at 690. We turn, then, to the question of whether that deficient performance prejudiced Mr. Hill to the extent that our confidence in the "guilty" verdict is undermined.

When cross-examined by the state, the clinical psychologist who testified for the defense acknowledged that Mr. Hill "was introduced to drugs at an early age" and related Mr. Hill's admission that "the use of alcohol was chronic, every day." The psychologist also stated that Mr. Hill had admitted that on the day of the events in question he was using or abusing drugs and, in fact, that in the period before those events, he "was drinking heavily and shooting dope through Arkansas, Texas and Oklahoma." In closing argument, Mr. Hill's second lawyer repeated the testimony that "during January and February of this year

. . . [Mr.] Hill was probably using drugs, alcohol." The psychologist also conceded that the results of one of the tests given to Mr. Hill could indicate "[a]nti-social conduct," "[n]ot mental sickness."

The psychiatrist who testified for the state summarized his diagnosis of Mr. Hill as without psychosis but drug-dependent. The psychiatrist related his opinion that Mr. Hill abused heroin, amphetamines, cocaine, and alcohol. In the psychiatrist's written report, which was entered into evidence, barbiturates and morphine were also named as drugs on which Mr. Hill was dependent. In closing argument, the state emphasized the conclusion of both the clinical psychologist who testified for the defense and the psychiatrist who testified for the state that "drugs and alcohol abuse" were a problem for Mr. Hill.

Insanity is an affirmative defense under Arkansas law, *see* Ark. Code Ann. § 5-2-312(a), that must be proved by a preponderance of the evidence, *see* Ark. Code Ann. § 5-1-111(d). *See also* AMI Criminal, 4009 (1982). The prejudice inquiry for the guilt phase of the state court trial at this stage must be, therefore, whether there is a reasonable probability that the jury would have concluded that Mr. Hill had proved his affirmative defense if Mr. Hill's lawyers had elicited the specific facts relative to his previous treatment with anti-psychotic drugs and the likelihood that he stopped taking them sometime within three to seven weeks before the events in question. *See Strickland,* 466 U.S. at 694-95. If no evidence had been introduced about Mr. Hill's drug and alcohol abuse, this would be an extremely close question, in our view, especially in light of what we consider the undoubted negative effect of presentation of a defense based on Mr. Hill's reaction to the insignia of the Arkansas Game and Fish Commission. With evidence of drug and alcohol abuse, however, we cannot say that we are so uncertain

about the reliability and fundamental fairness of the guilt phase of Mr. Hill's state court trial that we must reverse his conviction. *See Lockhart v. Fretwell*, 113 S.Ct. 838, 841-44 (1993), and *Strickland*, 466 U.S. at 685-88, 691-92, 694-96. We therefore turn to the same inquiries with respect to the penalty phase of Mr. Hill's state court trial.

V.

The jury found Mr. Hill guilty on all of the charges. The state trial court then allowed the state and Mr. Hill to present evidence relevant to the penalties that Mr. Hill should receive. At that phase of the trial, Mr. Hill's lawyers called only one witness — a minister who had visited with Mr. Hill for approximately two hours. The minister testified that Mr. Hill's "early family life" was "a definite negative influential factor" and that Mr. Hill had "been brought up under some very adverse kinds of circumstances and instilled with some values for which . . . he [may not be] completely and totally responsible." The minister remarked further that "the fact that no members of his family are here shows that for the most part throughout his life, he has been let to fend for himself and he has been alone." Mr. Hill's lawyers neither called any other witnesses nor introduced any documentary evidence of Mr. Hill's medical history, although Mr. Hill's second lawyer did refer several times during his closing argument to testimony presented during the guilt phase of the trial.

Under Arkansas law at the time of Mr. Hill's state court trial, a jury could impose a sentence of between 50 years and life in prison for attempted murder by a person with four or more previous felony convictions. The jury in Mr. Hill's case imposed a sentence of life in prison for the attempted murder of Mr. Ward.

Under Arkansas law at that time, a jury could impose

either life in prison without parole or the death penalty for murder. The death penalty could be imposed only if the jury found unanimously in writing that aggravating circumstances existed beyond a reasonable doubt, that aggravating circumstances outweighed beyond a reasonable doubt all mitigating circumstances that existed, and that aggravating circumstances justified beyond a reasonable doubt a sentence of death. *See* Ark. Code Ann. § 5-4-603(a). The only aggravating circumstances that a jury could consider were those specified by statute. *See* Ark. Code Ann. § 5-4-602(4). A jury could hear, however, "any mitigating circumstances." *See id.*

The relevant statutory aggravating circumstances at the time of Mr. Hill's state court trial were that the defendant had previously committed another felony that either was violent or created a substantial risk of death or serious injury to someone else, that the defendant knowingly created a great risk of death to someone other than the murder victim, and that the murder was committed in order to avoid or prevent arrest. *See* Ark. Code Ann. § 5-4-604(3), § 5-4-604(4), and § 5-4-604(5). In closing argument during the penalty phase of Mr. Hill's state court trial, the state suggested that all three of those aggravating circumstances were present in Mr. Hill's case, and the jury so found.

Relevant mitigating circumstances that a jury could consider included, but were not limited to, that the murder was committed while the defendant was under extreme mental or emotional disturbance, that the murder was committed while the defendant was acting under unusual pressures or influences, and that the murder was committed while the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, intoxication, or drug abuse. *See* Ark. Code

Ann. § 5-4-605(1), § 5-4-605(2), and § 5-4-605(3). In closing argument for the defense, Mr. Hill's second lawyer suggested that all three of those mitigating circumstances were present in Mr. Hill's case, especially the third one. The jury found that no mitigating circumstances were present. The jury then sentenced Mr. Hill to death for the murder of Mr. Teague.

Since the most important issue relative to the penalties imposed on Mr. Hill is whether the jury's choice of the death penalty for the murder of Mr. Teague may have been made because Mr. Hill received constitutionally significant ineffective assistance at the penalty phase of his state court trial, we address that question specifically. All of the same considerations apply, of course, to the jury's choice of life in prison for the attempted murder of Mr. Ward.

We consider first whether, at the penalty phase of Mr. Hill's state court trial, the performance of his lawyers was deficient. "The basic concerns of counsel during a capital sentencing proceeding are to neutralize the aggravating circumstances advanced by the state, and to present mitigating evidence." *Starr v. Lockhart*, No. 92-1466, slip op. at 4, 1994 U.S. App. LEXIS 9554 at *6, 1994 WL 157669 at *2 (8th Cir. May 2, 1994). "Evidence of . . . emotional disturbance is typically introduced by defendants in mitigation." *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982); *see Also Pickens v. Lockhart*, 714 F.2d 1455, 1466 (8th Cir. 1983) ("[t]here is no dispute that evidence of . . . emotional instability may be relevant in mitigation").

At least three months before the first scheduled trial date, Mr. Hill had told his first lawyer of his 1968 hospitalization in Oklahoma. The 1970 psychological evaluation, which Mr. Hill's lawyers received about a month before the second scheduled trial date, also referred at least

twice to that earlier hospitalization. Yet at no time, as far as we can tell, did Mr. Hill's lawyers try to obtain those 1968 medical records.

"Given the severity of the potential sentence and the reality that the life of [the defendant] was at stake," *Pickens*, 714 F.2d at 1467, we believe that it was the duty of Mr. Hill's lawyers to collect as much information as possible about Mr. Hill for use at the penalty phase of his state court trial. Their failure to obtain the records of Mr. Hill's earliest hospitalization does not seem to have been a tactical decision but, rather, because "counsel, as a result of inadequate preparation, had failed to discover the evidence," *Laws v. Armontrout*, 863 F.2d 1377, 1385 (8th Cir. 1988) (*en banc*), *cert. denied*, 490 U.S. 1040 (1989); *see also Kenley v. Armontrout*, 937 F.2d 1298, 1307 (8th Cir. 1991), *cert. denied*, 112 S.Ct. 431 (1991) ("[n]one of the information we have discussed was hidden from counsel. References were made to it or it was brought to his attention in the course of his review of materials and his representation of [the defendant]"), and *Eldridge v. Atkins*, 665 F.2d 228, 237 n.5 (8th Cir. 1981), *cert. denied*, 456 U.S. 910 (1982) ("[c]ounsel's 'strategy' not to use [certain witnesses] was not so much trial strategy as it was an accommodation to his own inadequate trial preparation. . . . although it may have been a trial decision of counsel not to pursue [certain] testimony it was counsel's lack of preparation which went a long way in inducing him to make it").

Those 1968 records, it turns out, contain the first account of Mr. Hill's positive response to anti-psychotic drugs. When Mr. Hill admitted himself voluntarily to the hospital in 1968, the doctor's notes from that day reflect, Mr. Hill was "very frightened," was "hearing [the] voice of his dead father," and felt "unreal" and "in a dream world." Four days later, according to a history taken at that time,

after having taken anti-psychotic drugs since his admission, Mr. Hill said "that he feels better and that his hallucinations have quit."

We have already concluded that the performance of Mr. Hill's lawyers at the guilt phase of his state court trial was deficient on account of their failure to present evidence of his history on anti-psychotic drugs and the likelihood that he had stopped taking them sometime within three to seven weeks before the events in question. That failure at the penalty phase of Mr. Hill's state court trial was exacerbated by the failure to obtain evidence related to Mr. Hill's first hospitalization, which contained an account of his early positive response to anti-psychotic drugs. We hold, therefore, that the performance of Mr. Hill's lawyers during the penalty phase of his trial was outside the range of "professionally competent assistance," *Strickland v. Washington*, 466 U.S. 668, 690 (1984).

We must turn, then, to the question of prejudice. The initial prejudice inquiry for the penalty phase of Mr. Hill's state court trial must be whether there is a reasonable probability that the jury would have concluded that at least one mitigating circumstance was present if Mr. Hill's lawyers had presented specific information about his history on anti-psychotic drugs and the likelihood that he had stopped taking them at a relevant time, *see* Ark. Code Ann. § 5-4-605. To put it another way, we ask whether Mr. Hill's lawyers' failure to present that information undermines our confidence in the jury's determination that there were no mitigating circumstances. *See Strickland*, 466 U.S. at 694-96.

Even if the jury decided that Mr. Hill had not proved that he was insane at the time the crimes were committed, evidence with respect to the effect of his failure to take

anti-psychotic drugs would have been critical in attempting to show the mitigating circumstances either of extreme mental or emotional disturbance, or of impaired capacity, caused by mental disease or defect, to appreciate the wrongfulness of his acts or to conform his conduct to the requirements of law. The evidence with respect to Mr. Hill's history of positive response to anti-psychotic drugs, and, even more importantly, of his regression to a psychotic state when he stopped taking those drugs, was not only the most substantial evidence that existed with respect to the likelihood that he was suffering from long-standing and extensive mental problems at the time of the events in question but also vastly more credible than the theory that Mr. Hill exploded at the sight of the insignia of the Arkansas Game and Fish Commission. Yet the jury had no opportunity to consider that evidence.

A clinical psychologist testified as an expert at the evidentiary hearing in federal court on the habeas petition. He concluded that the evidence related to Mr. Hill's deterioration when he stopped taking anti-psychotic drugs was "significant as far as [the] time sequence with the date of the occurrence" of the crime — that the records of Mr. Hill's history in that respect demonstrated "a strong likelihood" that Mr. Hill was psychotic at that time.

The lawyer testifying as an expert in capital litigation at that hearing stated that in his experience, "in the cases where I could explain to the jury why a crime occurred . . . they were more willing to impose a sentence of life imprisonment than in situations where I could not give any explanation for what happened and they thought the defendant was just mean." That lawyer further stated that the evidence related to Mr. Hill's deterioration when he stopped taking anti-psychotic drugs would have "help[ed] explain an emotional disturbance at the time" — "that at

the time of the offense there were other external factors affecting [Mr. Hill's] behavior, which is why the . . . murder occurred."

"Given the sympathetic light in which [the defendant's] past behavior could have been presented, . . . given the significant evidence of medically significant conditions and disorders, . . . and the prospects of successful treatment," *Kenley*, 937 F.2d at 1309, we can hardly imagine that Mr. Hill was not prejudiced by his lawyers' default. We believe, in fact, that a reasonable probability does exist that the jury would have found the existence of at least one, and possibly two, mitigating circumstances if Mr. Hill's lawyers had presented evidence with respect to his history on anti-psychotic drugs and his regression to a psychotic state when he stopped taking those drugs. In other words, that failure by Mr. Hill's lawyers has shaken our confidence in the jury's determination that no mitigating circumstances existed. *See, e.g., Lockhart v. Fretwell*, 113 S.Ct. 838, 841-44 (1993), and *Strickland*, 466 U.S. at 685-88, 691-92, 694-96; *see also Kenley*, 937 F.2d at 1308-09.

We must consider also, however, whether there is a reasonable probability that, if the jury had found the existence of at least one mitigating circumstance, the jury would have failed to find that the aggravating circumstances of the crime outweighed beyond a reasonable doubt all of the mitigating circumstances found. *See* Ark. Code Ann. § 5-4-603(a)(2). This is a most troubling question, because "[t]he weighing process is not simply a matter of counting the number of aggravating and mitigating circumstances and striking a balance. It is a reasoned judgment to be exercised in the light of the totality of the circumstances." *Giles v. State*, 549 S.W.2d 479, 485 (Ark. 1977) (*en banc*), *cert. denied*, 434 U.S. 894 (1977).

Our mistrust of the jury's finding with respect to the existence of mitigating circumstances makes us correspondingly unwilling to declare that, if the jury had found at least one mitigating circumstance, it would have found, beyond a reasonable doubt, that the aggravating circumstances outweighed the mitigating circumstances. In other words, we believe that a reasonable probability does exist, if the jury had found the evidence in question credible enough to establish at least one mitigating circumstance, that the jury would have decided that the aggravating circumstances did *not* outweigh the mitigating circumstances to the degree of certainty required — that is, beyond a reasonable doubt, *see* Ark. Code Ann. § 5-4-603(a)(2). For the same reasons, we believe that there is a reasonable probability, even if the jury had found beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances, that the jury would have decided that the aggravating circumstances did not justify, beyond a reasonable doubt, a sentence of death, *see* Ark. Code Ann. § 5-4-603(a)(3). *See, e.g., Williams v. State*, 621 S.W.2d 686, 688 (Ark. 1981), *cert. denied*, 459 U.S. 1042 (1982); *see also Pickens v. State*, 730 S.W.2d 230, 236 (Ark. 1987), *cert. denied*, 484 U.S. 917 (1987), and *Clines v. State*, 656 S.W.2d 684, 686 (Ark. 1983), *cert. denied*, 465 U.S. 1051 (1984).

In short, we find that because Mr. Hill's lawyers failed to present evidence with respect to his history on antipsychotic drugs and his regression to a psychotic state when he stopped taking those drugs, the penalty phase of his state court trial was rendered fundamentally unfair. *See Lockhart v. Fretwell*, 113 S.Ct. at 841-44, and *Strickland*, 466 U.S. at 685-88, 691-92, 694-96; *see also Kenley*, 937 F.2d at 1308-09. For the same reasons, our confidence is undermined in the jury's conclusion that Mr. Hill should receive life in prison, rather than a set term of 50 or more years, for the attempted murder of Mr. Ward. We therefore vacate both

of those sentences and remand the case to the district court. We direct the district court to order the state to retry the question of penalty for the murder of Mr. Teague and the attempted murder of Mr. Ward. (Mr. Hill apparently does not challenge the jury's finding, with respect to the attempted murder charge, that he had committed four or more prior felonies. We note, accordingly, that on retrial of the penalty to be imposed for that charge, Mr. Hill is bound by that finding.)

VI.

Because we have not vacated Mr. Hill's convictions, we address briefly his argument on cross-appeal with respect to the motion for change of venue. Mr. Hill contends, first, that the venire as a whole in his state court trial was prejudiced by pretrial publicity. Mr. Hill also argues that the district court improperly failed to conduct an independent review of the venue and *voir dire* proceedings from his state court trial. Finally, Mr. Hill argues that the state trial court never made an explicit finding that an impartial jury could be selected from the venire.

It is true that the Supreme Court has stated that it is "the duty of the Court of Appeals to independently evaluate the *voir dire* testimony of the empaneled jurors" when a habeas petitioner alleges an improper denial of a motion to change venue. *Irvin v. Dowd*, 366 U.S. 717, 723 (1961). In that same case, however, the Supreme Court also noted that "findings of impartiality should be set aside only where prejudice is 'manifest.' " *Id.* at 724, quoting *Reynolds v. United States*, 98 U.S. 145, 156 (1878).

In its opinion denying habeas relief with respect to venue, the district court described specific testimony presented on the venue issue and specific *voir dire* questions and answers from the members of the venire; the district

court also referred several times to "the record." *See Hill v. Lockhart*, 824 F. Supp. 1327, 1331-33, 1332 n.3 (E.D. Ark. 1993). It is obvious to us that the district court did conduct an independent review of the venue and *voir dire* proceedings from Mr. Hill's state court trial. It is also self-evident that the state trial court found, implicitly, that an impartial jury could be selected when that court directed the clerk to swear in the jurors finally chosen.

"In habeas proceedings, the determination by the trial judge that jurors are qualified is subject to a presumption of correctness. . . . This is so because the issue is essentially one of credibility, where the demeanor of the prospective juror becomes relevant. . . . Therefore, so long as there is fair support in the record for the state court's conclusions regarding the jurors' impartiality, those conclusions should not be overturned in habeas proceedings." *Snell v. Lockhart*, 14 F.3d 1289, 1294 (8th Cir. 1994), citing 28 U.S.C. § 2254(d)(8); *see also Simmons v. Lockhart*, 814 F.2d 504, 511 (8th Cir. 1987), *cert. denied*, 485 U.S. 1015 (1988) ("[a] state finding of the impartiality of the jury as a whole is to be overturned only if, upon an examination of the whole record, the federal court is convinced that error is manifest"). *See also Patton v. Yount*, 467 U.S. 1025, 1031-32 n.7 (1984) ("[i]t may be that there is little practical difference between the *Irvin* 'manifest error' standard and the 'fairly supported by the record' standard of the ., . . habeas statute. . . . In any case, we do not think the habeas standard is any less stringent").

We too have read the transcript of the venue and *voir dire* proceedings in the state court trial. The state trial court's conclusion that an impartial jury could be chosen is fairly supported by the record; in other words, we see no manifest error in the state trial court's actions in that regard.

Mr. Hill also argues, however, that six of the individual jurors actually chosen were not impartial. In "a federal habeas corpus case in which the partiality of an individual juror is placed in issue," the question "is plainly one of historical fact: did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed?" *Patton*, 467 U.S. at 1036. "Since identifying bias in an individual juror is as much a matter of assessing demeanor as it is of analyzing the answers which the juror gives to questions, . . . the findings of the trial court are entitled to particular deference" in such inquiries. *Simmons*, 814 F.2d at 511.

We have read and reread the transcript of the *voir dire* of the six jurors to whom Mr. Hill objects. We believe that the state trial court's conclusion that each could serve as an "impartial, 'indifferent' juror[ ]," *Irvin*, 366 U.S. at 722, is fairly supported by the record. In other words, we believe that there was no manifest error in that conclusion by the state trial court.

VII.

For the reasons stated, we reinstate Mr. Hill's convictions for both the attempted murder of Mr. Ward and the murder of Mr. Teague. We vacate Mr. Hill's sentences on those convictions and direct the district court to order the state to retry the question of penalty on those charges.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

DARREL WAYNE HILL ..... *Petitioner*

v. Civil No. PB-C-82-375

A. L. LOCKHART, Director
Arkansas Department of Correction ..... *Respondent*

MEMORANDUM OPINION AND ORDER

On July 11, 1980, a jury convicted petitioner Darrel Wayne Hill ("Hill") of capital felony murder, kidnapping and aggravated robbery in connection with the death of Donald Lee Teague. Hill was sentenced to death in connection with the capital felony murder and 50 years each on the other felonies. The jury also convicted Hill of attempted capital murder, kidnapping and aggravated robbery in connection with offenses against E. L. Ward. Hill was sentenced to life, and fifty years each respectively with regard to those offenses. Hill has filed a petition for writ of habeas corpus, raising thirteen separate grounds for relief.

Factual Background

In the afternoon of February 7, 1980, Hill drove into E. L. Ward's Service Station in Pencil Bluff, Arkansas. Ward checked Hill's radiator and filled his car with gas. A little later, Donald Teague, an Arkansas Game and Fish Commission officer, drove into the station, also wanting gas. Ward went inside the garage to clear the pumps. Hill, who was waiting inside the garage, pulled a gun on Ward and demanded his money. Hill then ordered Ward to put the money from the cash register into a money bag along with his wallet. Teague entered the garage at this time, and Hill

pointed the gun at Teague, told him to put his billfold in the money bag and told both men that they were going for a ride.

Hill ordered Teague to drive the car and Ward to bring the money bag. While in the car, Hill took the money from Ward's wallet and put it in his pocket. Hill ordered Teague to drive to a gravel road off the main highway. Hill had Teague stop the car, directed Teague and Ward into some weeds and forced them to lie down on their stomachs with their hands behind them. Hill shot Teague several times, killing him. Ward begged Hill to quit shooting, but Hill then shot Ward four times, wounding him. Ward remained in the weeds, not moving, until Hill had driven away. Ward then crawled back to the road, where he was found later that afternoon. Ward gave the police a description of his assailant and the car he was driving as Ward was taken to the hospital in Hot Springs.

A few hours later, a Hot Springs police officer saw a car matching the description. He stopped the vehicle at about the same time another officer arrived as back up. A search of the car yielded a brown paper sack containing a loaded Charter Arms .38 special and a large quantity of coins under the front seat on the driver's side. Hill was arrested and charged with the offenses of which he was ultimately convicted.

Hill appealed his convictions and sentences to the Arkansas Supreme Court. The court affirmed the conviction and sentence for capital felony murder but set aside the lesser included offenses of kidnapping and aggravated robbery in connection with the offenses against Teague. *Hill v. State*, 275 Ark. 71, 628 S.W.2d 284 (1982). The court found that Ark. Stat. Ann. §41-105(1)(a) and (2)(a) (Repl. 1977) [now codified as Ark. Code Ann. §5-1-110 (1987)] prohibits the

entry of a judgment of conviction on capital felony murder or attempted capital felony murder and the underlying specified felony or felonies.[1]

The United States Supreme Court denied Hill's petition for writ of certiorari on October 4, 1982. *Hill v. Arkansas*, 459 U.S. 882 (1982).

Hill then sought post-conviction relief from the Arkansas Supreme Court pursuant to Rule 37 of the Arkansas Rules of Criminal Procedure. The petition was denied, but the court set aside the convictions of kidnapping and aggravated robbery underlying the attempted capital murder conviction. *Hill v. State*, 278 Ark. 194, 644 S.W.2d 282 (1983).

Prior to filing his Rule 37 petition, Hill had filed a petition for writ of habeas corpus. Once Hill exhausted his state remedies, the Court entered an order staying execution. Hill filed an amended petition for writ of habeas corpus on April 7, 1989.[2] The Court conducted an evidentiary hearing

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[1]The court would not set aside the kidnapping and aggravated robbery included in the attempted capital felony murder conviction as the error was raised for the first time on appeal. The court noted that it could set aside the underlying felony convictions with regard to the capital felony murder conviction as the court will consider, in death cases, errors argued for the first time on direct appeal where prejudice is conclusively shown by the record. 275 Ark. at 77.

[2]The Governor set Hill's execution date for November 19, 1982. On November 12, Hill filed his original petition for writ of habeas corpus. At that time he had not exhausted his state remedies as his Rule 37 petition was pending before the Arkansas Supreme Court.

The Arkansas Supreme Court granted a stay of execution on November 15, 1982. The Court, on November 19, 1982, abstained from further action in the case in light of the pending state proceedings.

After the state supreme court denied the Rule 37 petition, the

on October 31, and November 1, 1990. The Court will address the claims raised in the amended petition.

Discussion

I. Hill argues that the Arkansas death penalty statute is unconstitutional because the capital felony murder statute [Ark. Stat. Ann. §41-1501 (Repl. 1977) now codified as Ark. Code Ann. §5-10-101(a)(1) (1987)] overlaps with the first degree felony murder statute [Ark. Stat. Ann. §41-1502(1)(a) (Repl. 1977) now codified as Ark. Code Ann. §5-10-102(a)(1) (1987)] and there are no standards to

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[2] *continued*

Governor set February 19, 1982 as Hill's execution date. Hill filed a supplemental application for stay of execution. On February 2, 1982, the Court granted Hill's motion for stay of execution.

Because of respondent's informal agreement to delay proceedings on a number of habeas petitions until the United States Supreme Court decided certain issues pertaining to the constitutionality of Arkansas' death penalty statute, no further action was taken until January 23, 1989, when the Court directed Hill to file an amended petition.

Some delay is necessitated by the special nature of habeas review of a death sentence. "The severity and finality of the death penalty requires the utmost diligence and scrutiny of the court." *Mercer v. Armontrout*, 864 F.2d 1429, 1431 (8th Cir. 1988). As the Honorable Donald P. Lay, former Chief Judge of the United States Court of Appeals for the Eighth Circuit has stated:

> Regardless of rhetoric that death penalty cases should receive the same review on habeas corpus as imprisonment cases, capital punishment is unique because it is irrevocable once performed. Therefore, it is incumbent upon a civilized society to make judicial procedures for capital punishment fundamentally fair, nondiscriminatory, and nonarbitrary. . . . Judicial review of death sentences must provide a studied examination of any violations of those standards.

Donald P. Lay, *The Writ of Habeas Corpus: A Complex Procedure for a Simple Process*, 77 Minn. L.Rev. 1015, 1017 (1993) (hereinafter Lay).

distinguish the two offenses thereby leading to the possibility that the jury's decision will be arbitrary and capricious.

The Arkansas Supreme Court rejected this argument, noting that the same argument had been rejected in other cases. *Hill*, 278 Ark. at 202. Recently, the Eighth Circuit held that the overlapping capital felony murder and first-degree felony murder statutes are not unconstitutionally vague. *Simpson v. Lockhart*, 942 F.2d 493 (8th Cir. 1991). The court found that "each statute unambiguously specifies the conduct prohibited and the penalties authorized upon conviction. This satisfies the fair notice requirements of the due process clause." 942 F.2d at 497.

The Court finds that the death penalty statute is not unconstitutionally vague or denies Hill equal protection because it overlaps with the first degree felony murder statute.

II. Hill contends that he was denied his right to a fair trial because the trial court denied his motion for change of venue based on pretrial publicity.

A hearing on Hill's motion for change of venue was held prior to trial. Defense counsel introduced the testimony of six witnesses who testified that they did not think Hill could receive a fair trial in Montgomery County.[3] The state presented three witnesses who testified that they believed

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[3]Even some of Hill's witnesses were not so certain that Hill could not receive a fair trial. Larry Graves, editor of the county newspaper, opined that whether Hill could get a fair trial in the county depended on the jurors who were selected. He testified that many people in the county had not formed an opinion or would be willing to listen to the evidence (Tr. 168). Lena May Helms testified that she did not have an opinion as to Hill's guilt or innocence (Tr. 208).

References to the state record of the trial proceedings are designated as Tr. References to the transcript of the evidentiary hearing are designated as H.T.

Hill could receive a fair trial.

The court, after considering the testimony, affidavits, and newspaper articles, found that Hill had not met his burden of demonstrating county-wide prejudice and denied the motion.

Defense counsel renewed the motion for change of venue at the beginning and end of voir dire. Counsel also requested that the voir dire be made part of the record on the motion.[4]

On appeal, the Arkansas Supreme Court found that the trial court had not abused its discretion in denying the motion for change of venue. 275 Ark. at 83. The trial court's determination as to the jury's impartiality is entitled to deference and can be overturned only for "manifest error." *Patton v. Yount*, 467 U.S. 1025, 1031, 104 S.Ct. 2885, 2888, 81 L.Ed. 2d 847 (1984) [trial judge's finding that a particular venire person was not biased and therefore properly seated is finding of fact subject to 28 U.S.C. §2254(d)].

The trial court in this case conducted a general voir dire, and then the parties conducted individual voir dire. Two prospective jurors, Hicks and Goss, were excused for cause during the general voir dire because they had fixed opinions regarding Hill's guilt which they could not set aside (Tr. 455). Sixty-six prospective jurors were examined during the individual voir dire. Of those, thirty-five were excused for cause, although not all because they had formed an opinion. A number of prospective jurors had a close relationship or friendship with E. L. Ward which affected

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[4]Although the trial court responded that it would consider the matter of change of venue at a later time (Tr. 512), the transcript does not reflect that the trial judge ever made any additional ruling on the renewed motions for change of venue.

their ability to be impartial (e.g., Maurine West, Tr. 516; Mary Lewis, Tr. 755; Edith Chambers, Tr. 909). Pearl Block was excused because her husband was a friend of Teague (Tr. 965). Prospective jurors McKinney and Scantling were excused for medical reasons (Tr. 572, 833). Wilma Lewis was excused on *Witherspoon* grounds (Tr. 876).

The record establishes that the jurors who were seated demonstrated that they could be fair and impartial. Bill Turpin knew Ward for 15 to 20 years but stated that he had no opinion as to Hill's guilt (Tr. 533). Laura Brandon also had no opinion, and she had not read or heard much about the case (Tr. 592). Similarly, Lelia Lewis had no knowledge of the facts of the case or the persons involved (Tr. 616). Jo Ellen Carmack also knew Ward, but assured the court that she could set aside her feelings and listen to the evidence (Tr. 737). James Fryar had read news accounts but had no opinion as to Hill's guilt (Tr. 742). Glenn Gaston was a friend of Ward and had read about the case, though he had not formed an opinion as to Hill's guilt. He assured the court that he could set aside what he had heard and base his verdict on the evidence (Tr. 755). Lillian Adams and Wanda Reed both had read or heard about the case but neither had formed opinions, and stated that they could put aside what they had heard (Tr. 770, 847). Opal Warren did not know much about the case and had not formed an opinion (Tr. 891). Betty Carter was acquainted with Ward, had read about the case and talked with others about it. However, she stated that she had not formed any opinion and assured the court that she could set aside what she had heard and give Hill a fair trial (Tr. 913-918). Barbara Buck had an opinion but stated that she would base her verdict solely on the evidence (Tr. 922). Mary Lee Harper indicated that she had formed an opinion about the case, but after extensive questioning assured the court that she could be fair and impartial (Tr. 951-963).

Jurors are not required to be totally ignorant of the facts and issues involved in a case. *See Simmons v. Lockart*, 814 F.2d 504, 510 (8th Cir. 1987), *cert. denied*, 485 U.S. 1015 (1988) ("The accused is not entitled to an ignorant jury, just a fair one.") "[A]n important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case." *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961).

The Court, in *Irvin*, refused to adopt a standard that any preconceived opinion as to a defendant's guilt or innocence, without more, would be sufficient to rebut the presumption of a prospective juror's impartiality. "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." 366 U.S. at 723.

Here, the record establishes that the court, along with counsel, conducted a thorough voir dire. Those prospective jurors who had set opinions that they could not set aside were excused for cause. The jurors that were seated had adequately assured the court that they could set aside their opinions and base their verdict solely on the evidence.

Furthermore, the record does not reveal "the kind of 'wave of public passion' that would have made a fair trial unlikely by the jury that was empaneled as a whole." *Patton v. Yount*, 467 U.S. at 1040, 104 S.Ct. at 2893. The adverse publicity had occurred within the first few weeks following the arrest of Hill, and by the time of the trial, community discussion had diminished considerably.

The Court finds that the trial court did not commit manifest error in denying Hill's motion for change of venue.

III. and IV. Hill contends that he was denied his Fifth, Eighth, and Fourteenth Amendment rights and his right to a fair trial on the issue of punishment because of the trial court's failure to grant a severance of offenses and its improper submission of the lesser included offenses to the jury as separate, substantive offenses at the guilt stage and subsequently for punishment at the sentencing phase. In addition, Hill states that the prosecutor improperly argued that the jury should consider his prior criminal record in determining his punishment when Hill did not put his prior criminal record in issue.[5]

As noted above, the underlying felony convictions of kidnapping and aggravating robbery were set aside by the Arkansas Supreme Court as violative of Ark. Stat. Ann. §41-105. The court refused to find that the erroneous submission of the underlying felony convictions prejudiced the sentencing procedure.

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[5]In his post-hearing brief, Hill has combined discussion of grounds Three and Four of his petition. The Amended Petition states as Ground Three: "Petitioner was denied rights secured to him by the Fifth, Eighth, and Fourteenth Amendments and a fair trial on the issue of punishment by the failure of the trial court to grant a severance of offenses and by the trial court's improper submission to the jury as separate, substantive offense at both the guilt stage, and subsequently for punishment at the sentencing phase, the lesser included offenses of aggravated robbery (2 counts) and kidnapping (2 counts)."

The Amended Petition states Ground Four as follows: "Petitioner was denied his rights under the Fifth, Eighth and Fourteenth Amendments by the prosecutor's improper argument to the jury that it should consider petitioner's extensive prior criminal record in determining punishment because such is not a statutory aggravating circumstance and petitioner did not put his prior criminal record in issue."

The Court has similarly consolidated the discussion of the two grounds because of the impact of the combined effect of the submission of the underlying felonies, and the prosecutor's improper argument. *See infra.*

Hill combines several different arguments all of which go to the fairness of the sentencing procedure. Hill contends that the jury's improper consideration of enhanced punishment and the actual imposition of four enhanced sentences of fifty years for the lesser included offenses had a prejudicial impact on the jury's consideration of the appropriate punishment for the capital offense. Hill also contends that the prosecutor erroneously used the non-violent felonies to establish the absence of a mitigating factor.

To understand Hill's position, a review of the proceedings is necessary. After the jury returned verdicts on all six offenses, the court progressed to the sentencing proceedings.[6]

The state sought to introduce five previous felony convictions. Defense counsel objected, arguing that three of the felonies did not fall within the definition of a statutory aggravating circumstance. The prosecutor then stated that he was offering the three non-violent felonies for enhancement purposes only with regard to the non-capital offenses, and not as a statutory aggravating circumstance. The trial court ruled that the three non-violent felonies would be admitted with a limiting instruction that they were not to be considered in connection with the punishment for capital murder (Tr. 1494-1512).

The prosecutor then changed tactics and indicated that he intended to argue that the three non-violent felonies were

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[6]According to the statute in effect at the time of Hill's trial, Ark. Stat. Ann. §41-1005 (Repl. 1977), when an extended sentence for a habitual offender is sought, the jury, if it reaches a guilty verdict, hears evidence of a defendant's previous felony convictions. The defendant has the right to controvert the evidence. The jury then determines the sentence in accordance with the provisions of Ark. Stat. Ann. §41-1001 (Repl. 1977).

to be used to negate the mitigating circumstance of no significant prior criminal history by showing that Hill had a substantial criminal record.[7] In open court, the following exchange took place:

> [Prosecutor]: Now it is applicable, Your Honor, or relevant that the State would say that the other offenses that have been introduced are now for the purpose of that tending to demonstrate that there is a substantial prior criminal record under the mitigating circumstances section.
>
> The Court: I presume you are offering that?

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[7]The Arkansas statute at the time provided that after the defendant was found guilty of capital murder, the jury then heard additional evidence relating to specific aggravating circumstances or any mitigating circumstance. Ark. Stat. Ann. §41-1301 (Repl. 1977). The statute provided as follows with regard to mitigating circumstances:

> Mitigating circumstances shall include, but are not limited to the following:
> (1) the capital murder was committed while the defendant was under extreme mental or emotional disturbance;
> (2) the capital murder was committed while the defendant was acting under unusual pressures or influences or under the domination of another person;
> (3) the capital murder was committed while the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, intoxication, or drug abuse;
> (4) the youth of the defendant at the time of the commission of the capital murder;
> (5) the capital murder was committed by another person and the defendant was an accomplice and his participation relatively minor;
> (6) the defendant has no significant history of prior criminal activity.

Ark. Stat. Ann. §41-1304 (Repl. 1977) (now codified as Ark. Code Ann. §5-4-605).

[Prosecutor]: Yes, Your Honor.

The Court: All right, sir.

[Defense Counsel]: Your Honor, I would point out to the Court that that has not been brought into the issue of mitigation at all; that that is simply an indication of the aggravation and that the jury should be instructed to consider it only as aggravation and not at all as mitigation portion, whatsoever.

The Court: The jury will be instructed on the items of mitigation. If that is there, they will consider it if they so desire. If it is not a proper item of mitigation, then the State, excuse me, then the jury shall not consider it. It is up to the jury it is on the verdict form of the instructions I give them. I will so advise . . .

Tr. 1531-1532.

Despite the clear law that the non-violent felonies could not be considered as an aggravating circumstance, the prosecutor continued to press for their consideration by the jury in its deliberation.[8] In closing argument during the

[8]The aggravating circumstances are limited to: (1) the capital murder was committed by a person imprisoned as a result of a felony conviction; (2) the capital murder was committed by a person unlawfully at liberty after being sentenced to imprisonment as a result of a felony conviction; (3) the person previously committed another felony any element of which was the use or threat of violence to another person or creating a substantial risk of death or serious physical injury to another person; (4) the person in the commission of the capital murder knowingly created a great risk of death to a person other than the victim; (5) the capital murder was committed for the purpose of avoiding or preventing an arrest or effecting an escape from custody; (6) the capital murder was committed for pecuniary gain; or (7) the capital murder was committed for the purpose of disrupting or hindering the lawful exercise of any government or political function. Ark. Stat. Ann. §41-1301 (Repl. 1977) (now codified as amended Ark. Code Ann. §5-4-604).

penalty phase, the prosecutor stated:

> On Form 2,[9] . . . as to mitigating circumstances . . . that is for your good judgment. I cannot find any. In fact the State would say to you that under 6, where it says Darrel Wayne Hill, has no significant, no significant history of prior criminal activities, I that if there was a sign, that said substantial significant history or prior criminal activities, you could check that. Here it says that he has no significant history and we show you five (5).

Tr. 1550.

The Arkansas Supreme Court rejected Hill's argument that the trial court erred in allowing the state to prove, during the penalty phase, three prior convictions that did not involve threat or violence. The court held that two separate hearings on sentencing when capital and non-capital offense are tried together is not warranted. It found that the jury was properly instructed regarding the use of the prior convictions. *Hill*, 275 Ark. at 86-88.

The Court agrees that the denial of a severance *per se* did not deprive Hill of a fair sentencing hearing. The Court, however, cannot agree that the prosecutor's use of three prior non-violent felonies to rebut a non-existent mitigating circumstance does not constitute constitutional error.

The Arkansas Supreme Court in *Ford v. State*, 276 Ark. 98, 104, 633 S.W.2d 3 (1982), *cert. denied*, 459 U.S. 1022 (1982) held that the trial court erred in allowing evidence during the sentencing phase of prior crimes that did not involve the use of threat of violence or create substantial risk

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[9]The prosecutor refers to Form 2 which deals with mitigating circumstances (Tr. 1538-1539).

of death or serious physical injury to another person as an aggravating circumstance. The use of such felonies was also not proper for the purpose of anticipating a showing of lack of convictions as a mitigating circumstance. The court went on, however, to hold that the improper admission of the felonies was not prejudicial because the jury did not find that the defendant had an aggravating circumstance of having a prior felony involving the use of or threat of violence to another person or involving the creation of substantial risk of death or serious physical injury to another person. That is, there is some evidence that the jury did not even consider the prior convictions.

Justice Hickman, in a strong dissent in *Ford*, contended that the use of the inadmissible prior convictions was prejudicial error. Because of the lack in the record of any evidence that the defendant had no significant history of prior criminal history, Justice Hickman noted that the trial judge should not have submitted the mitigating circumstance. He admonished the state's use of such evidence.

> 'In short, proof of other crimes is never admitted when its only relevancy is to show that the prisoner is a man of bad character, addicted to crime.'
>
> That is exactly what the State was able to do in this case.
>
> Ford should pay for the crime he committed, but our system cannot allow him to pay a price that is not fairly set by an impartial jury considering only relevant evidence in an atmosphere devoid of passion and prejudice.

276 Ark. at 115 (citation omitted).

The use of the non-violent felonies is even more prejudicial in this case than in *Ford*. Unlike *Ford*, the record

here does not establish that the jury did not consider the three non-violent felonies. Here, the jury specifically found the aggravating circumstance of a prior felony.

"Criteria set forth in the statute serve no purpose if prosecutors are free to ignore them." *Ford v. Arkansas*, 459 U.S. 1022, 1023, 103 S.Ct. 389, 390, 74 L.Ed. 2d 519 (1982) (Marshall, J., dissenting). Here, the prosecutor attempted to get in through the back door what was clearly prohibited by the statute. Aggravating circumstances are limited to those set forth in the statute. To argue that the additional felonies were to be used to rebut the lack of prior criminal history was disingenuous when Hill had not offered any evidence in mitigation concerning the lack of a significant prior criminal history.

The Arkansas Supreme Court in *Miller v. State*, 269 Ark. 341, 354, 605 S.W.2d 430 (1980), *cert. denied*, 450 U.S. 1035 (1981) recognized the problem and criticized the trial judges' practice of submitting to the jury in capital murder cases all seven of the statutory aggravating circumstances and all six of the enumerated mitigating circumstances.

> We think it a better practice, and less confusing to the jury, for the circuit judge to omit from submission any aggravating or mitigating circumstances that are completely unsupported by any evidence, and we take this opportunity to direct the circuit judges of Arkansas to hereafter allow this alternate procedure. If there is any evidence of the aggravating or mitigating circumstances, however slight, the matter should be submitted to the jury.

269 Ark. at 354.

The Court cannot conclude that the prosecutor's use of the three non-violent felonies was not prejudicial or harm-

less. *See Ford*, 459 U.S. at 1024 ("There is certainly no basis for concluding beyond a reasonable doubt that the jury would have sentenced petitioner to death had it not been informed of his prior convictions.")

Nor is there any basis for finding that the error was harmless or that it did not have a substantial and injurious effect or influence[10] on the jury's decision because the jury found only aggravating circumstances but not mitigating ones. The jury must find not only that the aggravating circumstances outweigh the mitigating ones but that the former "justify a sentence of death beyond a reasonable doubt." Ark. Stat. Ann. §41-1302(1)(c) (Repl. 1977) (codified as Ark. Code Ann. §5-4-603).[11] *See Williams v. State*, 274 Ark. 9, 12, 621 S.W.2d 686 (1981), *cert. denied*, 459 U.S. 1042 (1982) (court would not speculate as to what jury would do

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[10]The Supreme Court recently held that on a habeas review of a state conviction the appropriate standard for determining whether constitutional error of a trial type was harmless is whether the error had substantial and injurious effect or influence in determining the verdict, rather than the *Chapman v. California* standard of harmless beyond a reasonable doubt. *Brecht v. Abrahamson*, 113 S.Ct. 1710 (1993).

[11]Ark. Stat. Ann. §41-1302 (Repl. 1977) provided:

> (1) The jury shall impose a sentence of death if it unanimously returns written findings that:
> (a) aggravating circumstances exist beyond a reasonable doubt; and
> (b) aggravating circumstances outweight [outweigh] beyond a reasonable doubt all mitigating circumstances found to exist; and
> (c) aggravating circumstances justify a sentence of death beyond a reasonable doubt.

The statute was amended in 1985 to provide that the Arkansas Supreme Court perform a harmless error review of a defendant's death sentence if on appeal the court finds that the jury erred in finding the existence of any aggravating circumstance and if the jury found no mitigating circumstance. Ark. Code Ann. §5-4-603(d).

in death case if jury had found only two aggravating circumstances instead of three).

The prejudicial effect of the introduction of the felonies into the jury's deliberation during the penalty phase cannot be underestimated. As the Arkansas Supreme Court noted in *Whitmore v. State*, 296 Ark. 308, 316, 756 S.W.2d 890 (1988), the statute outlining the specific aggravating circumstances

> is concerned with disclosing whether the defendant's history establishes such a propensity for violence that it will reoccur. Once the jury knows about a defendant's past propensity for violence, it can weigh that against any mitigating circumstances. In striking this balance the jury determines if the defendant has such a marked propensity for violence that it would likely manifest itself again in the future. If the jury determines beyond a reasonable doubt that the defendant will strike again, it may sentence him to death.

Here, the jury was provided additional evidence of Hill's criminal history which it could have factored in its weighing process. While the use of the three non-violent felonies alone constituted error, the inclusion for sentencing of the underlying felonies compounded the error. There can be no doubt that the submission of six felonies to the jury for sentencing created an inflammatory or impassioned atmosphere. The six felonies coupled with the introduction of the five prior felonies may have so inflamed or prejudiced the jury that it was left with the inevitable conclusion that Hill "will strike again."

Indeed, the record reflects that the jury did not entirely understand the instructions regarding sentencing and had to be returned to the jury room to fill out the jury forms. The court was informed that the jury had reached a verdict. The following exchange took place:

The Court: Sheriff, would you get those verdict forms, Mr. Gaston handed me the instructions please. Mr. Fryar, the Foreman is now handing the verdict forms to the Sheriff. Thank you very much. Mr. Fryar, the verdict that you have handed me — is this the verdict of the jury?

Foreman: Yes sir.

The Court: You have reached a verdict?

Foreman: Yes sir.

The Court: Is this verdict or these verdicts that you have rendered, are they unanimous?

Foreman: Yes sir.

The Court: Thank you very much. Form 1 is signed by James R. Fryar, Foreman. Form 2, signed by James R. Fryar, Foreman . . . if you will permit me and excuse me just a minute . . . Verdict Form for Kidnapping of E. L. Ward.

> "We, the Jury, find that Darrel Wayne Hill has been convicted or found guilty of four (4) or more previous felonies and fix his sentence at: . . .

Gentlemen, this is an incomplete verdict form. All the verdict forms on, on the felonies other than capital felony murder are incomplete. The blanks to fill in the term of years has been left blank. Mr., You may sit down. Thank you very much. Mr. Fryar, did the jury in the kidnapping of E. L. Ward intend to return a verdict?

Mr. Fryar: (Foreman): Well, we must have misunderstood you. We thought we did, had.

• • • •

The Court: Okay, for the record, let me exhibit and tell you what has happened. Would that be alright?

[Prosecutor]: I believe they need to retire.

[Defense Counsel]: I believe they should retire.

The Court: Okay, what has happened. Ladies and Gentlemen and perhaps I, I hope you haven't misunderstood. On the verdict forms on the kidnapping, aggravated robbery and attempted capital murder. The three (3) spaces, A, B, and C call for certain verdict to be filled in by you in those blanks that are there. The figures that I read to you underneath those blanks in parenthesis are for your limits, for you to decide. So if you have decided, what you need to do is retire and take these forms and fill in within the limits specified on them what you so desire and at this time I will deliver all of the verdict forms back to the jury and ask that you further retire and complete them. Is there any specific questions with respect to that? You understand what I am saying, Mr. Fryar?

Mr. Fryar: Yes sir, we do now. We do now.

Tr. 1558-1560.

In conclusion the Court finds that the prosecutor's argument along with the submission of the underlying felonies to the jury for sentencing constituted constitutional error. The error had a substantial and injurious effect or influence in the jury's determination that Hill should receive the death penalty.

The Court finds that Hill is entitled to relief with regard to the punishment stage on these grounds. As the

Supreme Court in *Mills v. Maryland*, 486 U.S. 367, 383-84, 108 S.Ct. 1860, 1870, 100 L.Ed. 2d 384 (1988) stated:

> The decision to exercise the power of the State to execute a defendant is unlike any other decision citizens and public officials are called upon to make. Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case. The possibility that petitioner's jury conducted its task improperly certainly is great enough to require resentencing.

V. Hill asserts that the trial court unconstitutionally commented on the evidence when it instructed the jury during the penalty phase that it could only consider the two robbery convictions as aggravating circumstances. He contends that the court's instruction amounted to instructing the jury that it was to accept the two robbery convictions as an aggravating circumstance.

As noted above the use of the non-violent felonies to negate a mitigating circumstance was prejudicial. It is also clear that confusion surrounded the penalty phase based on the above quoted portion from the transcript.

The Court, however, cannot find that the trial court's instruction was erroneous or that the trial court unconstitutionally commented on the evidence. The record shows that the jury was instructed that it "may" consider the robbery convictions as aggravating circumstances. The Court finds that this ground is without merit.

VI. Hill contends that his sentence was rendered in violation of the Fifth, Eighth, and Fourteenth Amendments because the jury arbitrarily and capriciously failed to

consider relevant mitigating evidence demonstrating that Hill was suffering from extreme mental and emotional disturbance and also diminished capacity due to mental disease and drug and alcohol abuse. Respondent argues that this claimed barred by procedural default.

Even assuming that Hill had presented this claim to the state court and that it is therefore properly before this Court, the Court finds that it is without merit.[12] The evidence concerning Hill's chronic alcohol and drug abuse was presented during the guilt phase to support Hill's defense of diminished capacity or insanity. As will be discussed, defense counsel presented virtually no evidence of mitigation during the penalty phase and made only slight reference to the earlier testimony of concerning drug and alcohol dependence during his argument at the penalty stage (Tr. 1553).

That the jury did not find mitigating circumstances is not surprising given counsel's failure to effectively offer such evidence. *See discussion infra.* The Court, however, cannot find that the jury erred or acted arbitrarily and capriciously in failing to consider any mitigating evidence. Hill is not entitled to relief on this claim.

VII. Hill argues that one of the aggravating circumstances found by the jury, that the murder was committed for the purpose of avoiding a lawful arrest or effecting an escape from custody, has been given such a vague and overly broad interpretation as to lead to arbitrary and capricious sentencing in violation of *Godfrey v. Georgia,* 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed. 2d 394 (1980).

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[12] *See Kenley v. Armontrout,* 937 F.2d 1298, 1301 (8th Cir. 1991) (court may bypass procedural bar and address the merits of the issue where relief is denied and the merits are plainer and simpler than the procedural defenses).

In *Godfrey*, the Supreme Court held unconstitutionally vague the aggravating circumstance that the offense committed was "outrageously or wantonly vile, horrible or inhuman." A state "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.' " 446 U.S. at 429 (citations omitted). An "aggravating circumstance must be described in 'terms that are commonly understood, interpreted and applied.' " *Newlon v. Armontrout*, 885 F.2d 1328, 1334 (8th Cir. 1989), *cert. denied*, 497 U.S. 1038 (1990) (citation omitted).

The Court is not persuaded that the aggravating circumstance of "the murder was committed for the purpose of avoiding a lawful arrest or effecting an escape from custody" is vague, overly broad or capable of being misunderstood. Furthermore, as the Arkansas Supreme Court held, the facts of the case supported the finding of this particular aggravating circumstance. *Hill v. State*, 278 Ark. at 204 ("Under the facts of the case the jury was justified in finding that petitioner shot Teague and Ward to increase his chances of avoiding arrest after he had robbed Ward's service station.").

Hill is not entitled to relief on this ground.

VIII. Hill's eighth ground, challenging the constitutionality of the death qualified jury, is without merit in light of the Supreme Court's decision in *Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed. 2d 137 (1986), rejecting the argument raised by Hill.

IX. Hill argues that the Arkansas death penalty statute is unconstitutional because it penalizes the exercise of one's Sixth Amendment right to trial by jury in that the

death penalty can only be imposed by a jury and, therefore, one who exercises his right to trial by jury subjects himself to a possible sentence of death whereas one who pleads guilty cannot be sentenced to death.

This argument has been rejected by the Arkansas Supreme Court. *Ruiz & Denton v. State*, 275 Ark. 410, 630 S.W.2d 44 (1982), *cert. denied*, 459 U.S. 882 (1982).[13] In denying Hill's Rule 37 petition, the court found that the procedures governing jury trial in capital murder cases do not place an impermissible burden on the exercise of the right to trial by jury. The trial judge is not required to impose the death penalty in every case in which the jury prescribes it. *Hill v. State*, 278 Ark. at 197. *See also Corbitt v. New Jersey*, 439 U.S. 212, 99 S.Ct. 492, 58 L.Ed. 2d 466 (1978) (upholding constitutionality of New Jersey's sentencing scheme for first-degree murder). Hill is not entitled to relief on this ground.

X. and XI. Grounds X and XI are attacks on the constitutionality of the death penalty statute. In Ground X Hill asserts that the Arkansas death penalty statute, as applied since its enactment, has resulted in the arbitrary and capricious imposition of the death penalty upon only a few individuals. As the State notes, Hill's argument is so conclusory as to be impossible to answer. Indeed, Hill has not even briefed the argument in his post-hearing brief.

Hill has provided no support for his broad assertion that the Arkansas scheme results in the arbitrary and capricious imposition of the death penalty. The Court finds that Ground X is without merit.

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[13] *See also Pickens v. Lockhart*, 542 F. Supp. 585, 613 (E.D. Ark. 1982), *remanded*, 714 F. 2d 1455 (8th Cir. 1983), where the court rejected the identical argument in another death penalty habeas case.

In Ground XI Hill argues that his death sentence is cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments and deprives him of due process of law and equal protection of the laws. The State asserts that Hill has procedurally defaulted with regard to this issue.

Even assuming that the claim is not barred because of procedural default, the Court must conclude that it is without merit. The Arkansas death penalty statute has been found to be constitutional. *See Collins v. State*, 261 Ark. 195, 548 S.W.2d 106 (1977), *cert. denied*, 434 U.S. 878 (1977).

XII. Hill states that the imposition of the death penalty violated his rights under the Eighth and Fourteenth Amendments because the appellate court was not required to, and did not perform a comparative sentence review. According to Hill, the death sentence in this case is disproportionately severe in light of the circumstances of the case.

The United States Supreme Court has held that the Eighth Amendment does not require a comparative proportionality review of a death sentence in every case. *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed. 2d 29 (1984). Although not constitutionally mandated, the Arkansas Supreme Court did conduct a comparative sentence review in this case. In response to the issue raised in Hill's Rule 37 petition, the Arkansas Supreme Court stated:

> On appeal from a sentence of death, it is the practice of this Court to compare the sentence with sentences in other cases in which the death penalty has been imposed. *Collins, supra.* Petitioner argues that in his case no comparative review was required or afforded by this Court, apparently because the opinion does not specifically state that it was.
>
> While there is no absolute requirement under federal

law that this Court make a comparative review of a death sentence, we have consistently afforded such review since *Collins*, although our opinions do not so state in all cases.

278 Ark. at 205.

The Court finds that Hill is not entitled to relief on this ground.

XIII. Hill argues that he was denied effective assistance of counsel at trial. In his amended petition, he outlines the areas in which counsel's performance was deficient.[14]

(1) Trial counsel failed to adequately prepare for trial or conduct any meaningful investigation of the case because:

(a) they did not adequately investigate and determine

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[14]In his post-hearing brief, Hill limits his ineffective assistance claim to six points, as follows:

1. Counsel was ineffective in not filing any motions on Hill's behalf concerning the constitutionality of the Arkansas death penalty statute on its face or as applied to Hill.
2. Counsel was ineffective in failing to obtain proper affidavits or presenting necessary evidence in support of the motion for change of venue.
3. Counsel was ineffective in failing to adequately move and argue for a severance of offenses.
4. Counsel was ineffective in the handling of the voir dire.
5. Counsel was ineffective in failing to adequately investigate or develop a theory of defense, and in failing to obtain the evidence to establish a defense of diminished capacity or insanity defense.
6. Counsel was ineffective at the penalty phase because they did not effectively investigate and present evidence of Hill's history of mental illness, drug and alcohol abuse as a mitigating circumstance.

the relevant facts of the case;

(b) they did not interview or contact relevant witnesses for the state;

(c) they did not adequately determine and develop petitioner's version of the facts;

(d) they did not determine and investigate possible defense witnesses to develop a defense to the charge;

(e) they did not determine and investigate witnesses who could have been called at the sentencing phase of the trial to offer evidence in mitigation.

(2) Trial counsel had virtually no experience in and were not adequately versed in the law pertaining to capital cases nor the procedures by which such cases are tried. Such lack of knowledge and experience resulted in counsel's failure to raise issues crucial to petitioner's case and in their failure to protect petitioner from the improper application of the Arkansas death penalty statute.

(3) Counsel's inadequate preparation for a capital case resulted in their failure to raise by pretrial motions issues regarding the constitutionality of the Arkansas death penalty statute, on its face and in its application.

(4) Counsel failed to properly investigate and present qualified witnesses in support of petitioner's motion for change of venue.

(5) Counsel was further ineffective in not renewing the motion for severance of offenses and in not conducting proper research to present the obvious and proper reason for the granting of the motion for severance.

(6) Counsel failed to object to the State's amendment of the information to add the habitual offender charges to

the non-capital felonies which resulted in the jury erroneously being presented with evidence of non-statutory aggravating circumstances at the penalty phase of the trial.

(7) Counsel was ineffective in failing to object to erroneous jury instructions and verdict forms submitted to the jury at both the guilt and sentencing phases of trial which erroneously allowed the jury to consider the lesser offenses of kidnapping and robbery as independent, substantive offenses and to impose punishment on those offenses contrary to Arkansas law.

(8) Counsel failed to request an instruction that according to Arkansas law, the jury could return a verdict of life imprisonment without parole despite making all the findings required for a sentence of death.

(9) Counsel failed to file a motion to have the jury's verdict set aside due to its improper refusal to consider evidence offered in mitigation.

(10) Counsel failed to investigate, research or prepare for the penalty phase of this case.[15]

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[15]The state argues that Hill has procedurally defaulted on all the claims with the exception of 1(e). The Court does not agree. The Arkansas Supreme Court addressed the issue of ineffective assistance of counsel in Hill's Rule 37 petition. 278 Ark. 194, 203, 205 (1983).

For a criticism of reliance on procedural technicalities to deny a petitioner review of the merits of his or her constitutional claim, *see Lay*, at 1063 ("It is difficult for many of us to believe that in today's society an individual may be executed by reason of technical error by his or her lawyer in order to exalt the goal of state finality above the requirements of fundamental fairness.")

Indeed, the Arkansas Supreme Court decades ago in *Swagger v. State*, 227 Ark. 45, 53, 296 S.W.2d 204 (1956) recognized the value and the role that fundamental fairness should play in criminal proceedings by noting that where a "judgment is void because of the want of due process of law, it has no force and effect, and can be vacated at any time."

In order to prevail on a claim of ineffective assistance of counsel, Hill must establish both that his trial counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's alleged unprofessional errors, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S.Ct. 2052, 2064, 2068, 80 L.Ed.2d 674 (1984). In a death penalty case, the Court must determine "whether, but for counsel's deficient performance, there is a reasonable probability the jury would have concluded the balance of the aggravating and mitigating circumstances did not warrant death." *Kenley v. Armontrout*, 937 F.2d 1298, 1304 (8th Cir. 1991), *cert. denied*, 112 S.Ct. 431 (1991).

Hill was charged on February 7, 1980, with the death of Teague and the shooting of E. L. Ward. Bill McKimm and John Peterson were appointed to represent Hill on February 13, 1980. In late March, Peterson was relieved as counsel and Bob Keeter was appointed as co-counsel.

McKimm was of the opinion that the state's case was strong due to the existence of Ward, an eyewitness, and concluded that an insanity defense was about "the only way to go" (H.T. 22, 27).

On February 22, 1980, counsel filed a petition raising the insanity defense and requesting a state hospital evaluation (Tr. 5). The trial court entered a commitment order on March 12, 1980 (Tr. 6).

By letter dated March 8, 1980, Hill provided defense counsel with information concerning his hospitalizations. (H.T. Petitioner's Exhibit 6). Counsel advised Dr. Oglesby of the Arkansas State Hospital where Hill was being evaluated of the prior hospitalizations, including the names

of the treating physicians, and informed them where Hill's records could be obtained. Counsel also advised Dr. Oglesby of Hill's previous diagnosis of acute paranoid schizophrenia and that he had failed to take his anti-psychotic medication prior to the crime (H.T. Petitioner's Exhibit 7).

On April 17, 1980, counsel filed a motion requesting production of the Arkansas State Hospital records. On April 25, 1980, the trial court entered an order for production of the complete record of examination from the Arkansas State Hospital (Tr. 20).

McKimm testified at the evidentiary hearing that he received the Arkansas State Hospital records sometime after May 1, 1980 (H.T. 31, 32). The records from Arkansas State Hospital did not include any records of Hill's previous hospitalizations in Oklahoma.

At the May 22, 1980, omnibus hearing, counsel requested that the competency hearing be continued until they had received the medical records from Oklahoma (Tr. 128). The trial court indicated it would allow the defense to present at a later date any additional medical information they might obtain from the institutions (Tr. 128, 129).

The trial court determined that Hill was competent to proceed to trial (Tr. 140). After the court announced its ruling, defense counsel renewed a request for the appointment of an independent psychiatrist to examine Hill prior to trial. The court denied the request and opined that it did not have sufficient grounds to grant it at the time (Tr. 143). At defense counsel's request, the court entered an order requiring the Arkansas State Hospital to turn over whatever Oklahoma records it had (Tr. 142-143).

At the omnibus hearing, about two weeks before the

scheduled June 9th trial, defense counsel indicated that they had not received psychiatric reports from Oklahoma and were not in a position to inform the court if insanity would be raised as a defense (Tr. 377). The trial, however, was continued when one of defense counsel was called to active duty by the United States Army.

On June 10, 1980, the hospital in Oklahoma sent to defense counsel some of Hill's records (H.T. Petitioner's Exhibits 9 and 10). As was later determined, these records were incomplete. Defense counsel did not learn of the additional records until shortly before the habeas hearing (H.T. 45).

On June 27, 1980, counsel filed a motion for appointment of an independent expert. Dr. Douglas Stevens, a psychologist, was appointed. He met with Hill, evaluated him and ultimately testified at trial.

Hill argues that his counsel failed to adequately investigate and present the insanity defense. He points to counsel's failure to contact Hill's physicians and hospital staff and to obtain all the medical records. He notes that counsel failed to contact the staff at the Tulsa Unit of Eastern State Hospital concerning Hill's outpatient treatment at the facility from the time of his discharge in August, 1979, through January 16, 1980, when Hill failed to make his appointment to receive his anti-psychotic medication, just three weeks before the crime occurred.

Thomas Carpenter, an attorney with criminal experience, testified as an expert in capital case litigation. He stated that when insanity is a defense, counsel must begin preparation early and that reasonably competent counsel would have obtained all of Hill's records as soon as possible to effectively develop and present this defense (H.T. 175).

"Reasonable performance of counsel" includes an adequate investigation of the facts of the case, consideration of viable theories, and development of evidence to support those theories. *Henderson v. Sargent*, 926 F.2d 706, 711 (8th Cir. 1991), *cert. denied*, 112 S.Ct. 915 (1992).

Investigation and development of the insanity defense was hardly more than perfunctory. Counsel should have begun their efforts to obtain medical records sooner, and should have talked to potential witnesses. An earlier request for the appointment of an independent expert might have revealed the need for additional evaluation and documentation.

Counsel did not contact all Hill's treating physicians, who could testify to the effects of Hill's failure to take his anti-psychotic medication. No effort was made to introduce the medical records which would have established that Hill had a long history of mental illness. Without the supporting medical records from Oklahoma, Dr. Stevens' diagnosis was made in a vacuum without additional evidence to validate it.

Furthermore, additional investigation would have better prepared defense counsel to cross examine Dr. Rosendale. The records would have called into question Dr. Rosendale's diagnosis (H.T. 234).

Defense counsel's argument that the records were prejudicial because they contained prior conviction evidence or bad act information cannot justify defense counsel's failure to introduce them. As Thomas Carpenter testified at the evidentiary hearing, the bad act information could have been redacted or defense counsel could have filed a motion in limine to keep out the information. As Carpenter stated, "It's a perfect basis for a motion in limine

to the judge and request that the record be redacted and to present it that way." (H.T. 186)

The resulting prejudice from the failure of counsel to adequately investigate and present a defense cannot be underestimated. The jury was presented only minimal, incomplete information. They did not have the documentation establishing a long history of drug and alcohol abuse, mental illness, including auditory hallucinations and paranoid delusions for ten years. The jury was not told of the May, 1979, legal finding of insanity where Hill was found incompetent to proceed to trial on charges pending in Oklahoma. Hill was treated continuously from May, 1979, until he was discharged with a guarded prognosis on August 8, 1979, to stand trial in Oklahoma. He still required outpatient treatment and anti-psychotic medication to avoid becoming psychotic again. The jury was not informed of the adverse consequences of Hill's failure to take anti-psychotic medication right before the crime. Dr. James Moneypenny, an expert in clinical psychology who testified at the evidentiary hearing, stated that the records were extremely significant and established a strong likelihood that Hill was actively psychotic at the time of the offense (H.T. 227, 228, 232-237, 247, 248). Dr. Moneypenny further stated that the Oklahoma mental health records provide a strong case for the likelihood that Hill's mental state at the time of the offense was impaired to such a degree that he could not distinguish between right and wrong (H.T. 248).

The Court finds that defense counsel failed to adequately investigate and present an insanity defense. The Court is further persuaded that but for counsel's errors the result would have been different.

With regard to the other claims of ineffective assistance of counsel at the guilt/innocence phase, the Court does not

find that counsel's performance was deficient. Although they did not file certain pretrial motions, defense counsel orally challenged the constitutionality of the death penalty statute. Furthermore, Hill has failed to demonstrate any prejudice by counsel's failure to file such pretrial motions.

With regard to the failure to obtain additional affidavits in support of a motion for change of venue, Hill has also failed to demonstrate prejudice. At the close of the voir dire, counsel moved for a change of venue and asked that the voir dire proceedings be incorporated in the motion to establish that Hill could not receive a fair trial.

The Court does not find counsel's performance deficient. As discussed above, Hill was not prejudiced by the denial of the motion for change of the venue. *See Swindler v. Lockhart*, 885 F.2d 1342, 1351-52 (8th Cir. 1989), *cert. denied*, 495 U.S. 911 (1990) (defendant did not suffer prejudice from counsel's failure to follow the letter of the statute when moving for a change of venue).

Furthermore, counsel's performance during voir dire was not deficient. The Court finds that counsel adequately questioned prospective jurors and made appropriate objections. Even Hill's expert at the habeas hearing stated that counsel had done an excellent job during voir dire (H.T. 190).

Hill's assertions concerning counsel's failure to move for severance, failure to object to the State's amendment of the information, failing to object to jury instructions, and failure to move to set aside the verdict are all without merit. Hill cannot establish that he was prejudiced by counsel's performance.

Hill also complains that counsel failed to request a jury

instruction that the jury could return a verdict of life imprisonment without parole despite making all the findings required for a sentence of death. This contention is without merit. The jury instruction provided, AMCI 1509, provides that the jury must find that a sentence of death is justified.

Thus, with respect to the guilt/innocence phase, the Court finds that counsel did not render Hill effective assistance with respect to investigating and presenting an insanity defense. The Court is also persuaded that counsel did not render Hill effective assistance during the penalty phase.

The only evidence defense counsel offered in mitigation was the testimony of Reverend Nixon, a Methodist minister. He had met with Hill two times while Hill was awaiting trial.

Even defense counsel, during the habeas hearing, admitted that they "did not establish a great deal through" Nixon (H.T. 96). In fact, they did not establish anything through Nixon, who was virtually a stranger to Hill.

The medical records available to defense counsel at the time establish that Hill had an extensive history of mental illness, drug and alcohol abuse. Counsel did not offer these records into evidence at the time of the trial. Furthermore, as noted above, counsel did not obtain additional medical records which would have provided further background information on Hill, particularly that concerning Hill's troubled childhood. Nor did counsel have Dr. Stevens testify during mitigation regarding Hill's background. "Evidence of a difficult family history and of emotional disturbance" is generally relevant to mitigation. *Eddings v. Oklahoma,*

455 U.S. 104, 115, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). Here, defense counsel completely abdicated their responsibility in presenting to the jury this extremely relevant, and important information.

Defense counsel also failed to adequately interview witnesses or discover mitigating evidence. *See Kenley v. Armontrout*, 937 F.2d 1298, 1304 (8th Cir. 1991) ("Failing to interview witnesses or discover mitigating evidence relates to trial preparation and not trial strategy.") Defense counsel testified at the hearing that Hill did not want his mother to testify. Counsel also stated that Hill's brother and sister-in-law did not want to testify at trial (H.T. 144). There is no indication, however, that counsel attempted to discover other witnesses who could testify in mitigation, such as other family members or mental health personnel who had known Hill.

Counsel testified that they did not want to put in the medical records because of what was in their opinion damaging information concerning Hill's criminal history and prior bad acts. In rejecting a similar argument, the court in *Kenley v. Armontrout*, 937 F.2d at 1309 stated: "[I]n the context of what the jury had already heard at trial about [defendant's] crazed and violent actions on the night of the crimes, we are doubtful that much of the additional aggravating information would have had any significant incremental aggravating effect on the jury."

The Court cannot speculate that the failure to provide the medical records in support of Hill's history of drug and alcohol abuse would do more harm than good or that Hill was not prejudiced by the omission. The jury would have considered it and might have been influenced by it. *See Pickens v. Lockhart*, 714 F.2d 1455, 1467 (8th Cir. 1983).

In sum, the Court finds that Hill did not receive effective assistance of counsel during the penalty phase. Given Hill's long history of mental illness, drug and alcohol abuse and troubled childhood, it was unreasonable to not offer the medical records during the penalty stage. It was also not reasonable for counsel not to thoroughly investigate possible mitigating evidence.

The prejudice is clear. The jury was deprived of hearing important, mitigating evidence which could have been presented in a sympathetic light. The jury's " 'possession of the fullest information possible concerning the defendant's life and characteristics' is '[h]ighly relevant — *if not essential* — [to the] selection of the appropriate sentence . . .' " *Lockett v. Ohio*, 438 U.S. 586, 603, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (citation omitted). The Court finds that there is a reasonable probability that the outcome of the sentencing proceeding would have been different but for counsel's ineffectiveness.

Conclusion

The Court finds that counsel was ineffective at both the guilt and penalty stages. The Court further finds that constitutional error occurred during the penalty phase when the prosecutor used three non-violent felonies as a non-statutory aggravating circumstance.

The petition for writ of habeas corpus is granted. The State is required to vacate Hill's convictions and sentences and either retry him within 120 days or the writ of habeas corpus shall be issued and Hill will be released.

IT IS SO ORDERED this 23rd day of June, 1993.

/s/ George Howard, Jr.
United States District Judge

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 93-2894/3159EAPB

Darrel Wayne Hill,	★	
	★	
Appellee/Cross-Appellant,	★	
	★	Appeal from the
vs.	★	United States District
	★	Court for the Eastern
A. L. Lockhart, etc.,	★	District of Arkansas.
	★	
Appellant/Cross-Appellee.	★	

The petitions for rehearing by the panel filed by appellee/cross-appellant and by appellant/cross-appellee are denied.

August 16, 1994

Order Entered at the Direction of the Court

/s/ Clerk, U.S. Court of Appeals, Eighth Circuit

ORIGINAL

Supreme Court, U.S.
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DEC 28 1994
OFFICE OF THE CLERK

RECEIVED
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SUPREME COURT, U.S.

NO. 94-881

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

A.L. LOCKHART, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION.....PETITIONER

VS.

DARREL WAYNE HILL.....RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT
IN OPPOSITION TO PETITION

DARREL WAYNE HILL
RESPONDENT

BY: RAY HARTENSTEIN
ATTORNEY FOR RESPONDENT
ARKANSAS BAR NO. 77061
10 SHEPARD COURT
LITTLE ROCK, AR 72212
(501) 376-1788

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REASON FOR DENYING THE WRIT

The United States District Court for the Eastern District of Arkansas granted respondent Hill habeas corpus relief, finding respondent received constitutionally significant ineffective assistance of counsel at both the guilt and sentencing phases of his trial, and, further, that Hill was prejudiced at the sentencing phase of his trial by the improper submission to the jury of lesser included offenses for enhanced punishment, which, in turn, allowed the prosecutor to improperly argue three non-violent prior felonies as a justification for the jury's imposition of the death penalty. Hill v. Lockhart, 824 F. Supp. 1327 (E.D. Ark. 1993). On appeal, the Eighth Circuit reinstated Hill's capital and non-capital convictions, finding Hill was not sufficiently prejudiced by trial by counsels' constitutionally deficient performance to warrant relief at the guilt stage of his trial, but affirming the district court's finding of constitutionally significant ineffective assistance of counsel at the sentencing phase. Hill v. Lockhart, 28 F.3d 832 (8th Cir. 1994). Because of its finding Hill received constitutionally significant ineffective assistance of counsel at the sentencing phase, the Eighth Circuit did not, and did not need to, address the issue of prejudice stemming from the other, undisputed errors which occurred during the sentencing phase. Id., at 834.

Petitioner seeks review in this Court of the court of appeals' failure to address what it terms an "unresolved" issue which "unquestionably" will recur at the resentencing trial

ordered by that court. As will be discussed further herein, the issues of the propriety of submitting the lesser included offenses for enhanced punishment and allowing argument concerning the existence of prior, non-violent felonies as a justification for imposition of the penalty of death are neither "unresolved" nor likely to recur at any resentencing trial if Arkansas state law is followed.

The crux of petitioner's argument is that the Eighth Circuit should have addressed the issue of whether the district court correctly found error in the procedures employed in the sentencing phase of Hill's trial. Petitioner characterizes this issue as an "unresolved" issue under Arkansas law, and because "unresolved", likely to recur at any resentencing trial unless the Eighth Circuit is ordered to address the merits of the issue.

It is firmly established by Arkansas statute that when a criminal offense, by definition, includes a lesser included offense, a conviction cannot be had for both offenses. Ark. Stat. Ann. §41-105 (1)(a) and (2)(a) (Repl. 1977) (now codified as Ark. Code Ann. §5-1-110 (1987)). Relying on this statute, the Arkansas Supreme Court found error in the submission to the jury of the lesser included offenses as separate, substantive offenses for enhanced punishment on Hill's direct appeal and in his postconviction proceedings. Hill v. State, 628 S.W.2d 284 (Ark. 1982) and Hill v. State, 644 S.W.2d 282 (Ark. 1983). In finding error in this regard, the district court merely affirmed existing state court precedent. Hill v. Lockhart, 824 F. Supp. at 1333.

In fact, the error in submitting the lesser included offenses for enhanced punishment was conceded throughout the habeas proceedings. This issue is clearly not "unresolved" and there was no reason for the Eighth Circuit to address it.

Similarly, it is equally firmly established under Arkansas law that it is error to allow evidence, or argument, during the sentencing phase concerning prior crimes that do not involve the use or threat of violence or create a substantial risk of death or serious physical injury to another person to either establish an aggravating circumstance or justify the death penalty. Ford v. State, 633 S.W.2d 3 (Ark. 1982), cert. denied, 459 U.S. 1022. By statute, in order for a prior offense to be admissible as an aggravating circumstance or to justify a sentence of death, the prior felony must involve the use or threat of violence or create a substantial risk of death or serious physical injury. Ark. Stat. Ann. §41-1303 (Repl. 1977) (now codified as Ark. Code Ann. §5-4-604 (1987)). It is also improper to use prior, non-violent felonies for the purpose of anticipating a showing of a lack of prior convictions as a mitigating circumstance. Ford v. State. In finding error, the district court again merely followed existing state law precedent. Hill v. Lockhart, 824 F. Supp. at 1335.

The district court noted that the state supreme court had failed to address the issue of prejudice to Hill's right to a fair trial on the issue of punishment resulting from these sentencing errors. Hill v. Lockhart, 824 F. Supp. at 1333-34.

See, Ford v. Arkansas, 459 U.S. 1022 (1982) (Marshalll, J., dissenting) (criticizing the Arkansas Supreme Court's "cavalier use of the harmless error doctrine" and noting that "[c]riteria set forth in a statute serve no purpose if prosecutors are free to ignore them"). There being no dispute but that sentencing error did occur, counsel for petitioner and respondent agreed at the district court level that the only real issue for decision was that of resulting prejudice. The district court was invited to address that issue, and did, concluding the errors had a substantial and injurious effect or influence on the jury's sentencing decision. Hill v. Lockhart, 824 F. Supp. at 1336. On appeal to the Eighth Circuit, it was the district court's finding of prejudice that petitioner questioned, not the legal predicate for its determination that error occurred in the sentencing proceedings.

Because the legal precedents for the district court's finding of error in the sentencing phase of Hill's trial are firmly established, undisputed, and not "unresolved", there was no need for the Eighth Circuit to address the issue of whether there was sentencing phase error, and there is no likelihood the errors will recur at any resentencing trial. Further, because of the court of appeal's finding of constitutionally significant ineffectiveness of counsel at the sentencing phase, a finding petitioner does not challenge, there was no need to address or question the district court's finding of prejudice, **precisely** because of the unlikelihood such errors would recur upon retrial.

CONCLUSION

For the reasons and authorities set forth herein, it is submitted that the issue of whether sentencing phase error occurred in Hill's trial is firmly established under state law and is in no way unresolved, thereby rendering the likelihood that such would again become an issue at any resentencing trial a nullity. Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

DARREL HILL
RESPONDENT

BY:

RAY HARTENSTEIN
Attorney for Respondent
Arkansas Bar No. 77061
10 Shepard Court
Little Rock, AR 72212
(501) 376-1788

NO. 94-881

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

A.L. LOCKHART, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION.....PETITIONER

VS.

DARREL WAYNE HILL.....RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CERTIFICATE OF SERVICE

I, Ray Hartenstein, a member of the Bar of this Court and counsel for Respondent, do hereby certify that a copy of Respondent's Brief in Opposition has been served upon counsel for Petitioner, Winston Bryant, Attorney General for the State of Arkansas, by placing a copy of same in the United States mail, postage prepaid, to Winston Bryant, Attorney General, 200 Tower Building, 323 Center Street, Little Rock, Arkansas 72201 this 23rd day of November, 1994.

Ray Hartenstein
RAY HARTENSTEIN

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SUPREME COURT, U.S.

RAY HARTENSTEIN
ATTORNEY AT LAW

10 SHEPARD COURT
LITTLE ROCK, ARKANSAS 72212
(501) 376-1788

1317 MAIN STREET
CONWAY, ARKANSAS 72032
(501) 329-5803

November 22, 1994

Honorable William K. Suter
Clerk of the Court
Supreme Court of the United States
Washington, D.C. 20543

Re: A.L. Lockhart, Director, Arkansas Department of Correction,
v. Darrel Wayne Hill
No. 94-881

Dear Mr. Suter:

Pursuant to Rule 46, please find enclosed Brief for Respondent in Opposition to Petition with Certificate of Service. Counsel has previously been appointed to represent Respondent Hill in the district court and court of appeals.

Please advise if you have any questions concerning this filing.

Sincerely,

Ray Hartenstein

Ray Hartenstein

Enclosure